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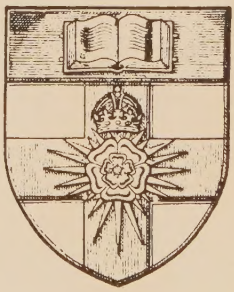

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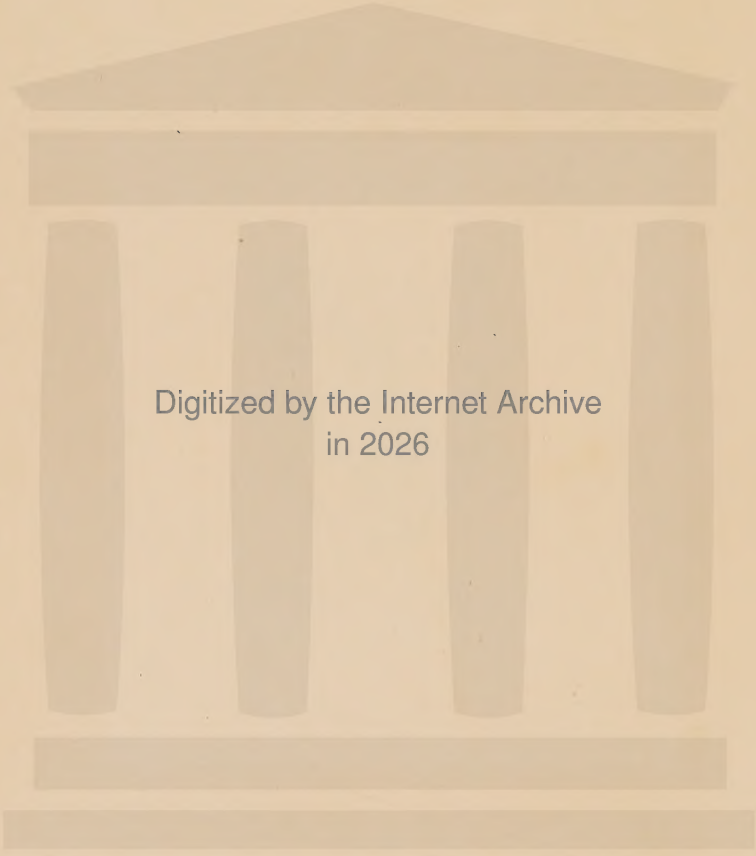
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1907
Oct. 14.

JOHNSON *v.* PICKERING; NORTON, CLAIMANT.

Practice—Execution by fieri facias—Money belonging to Judgment Debtor—Death of Judgment Debtor before Seizure by Sheriff—Administration Order under Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), s. 125—*Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 12.

After the death of a judgment debtor against whose effects a writ of fieri facias had been sued out, the sheriff has no power under the Judgments Act, 1838, s. 12, to seize by virtue of the writ money which belonged to the judgment debtor in his life-time.

The goods of a judgment debtor at his house were seized under a fieri facias. While the sheriff was in possession at the house, the judgment debtor, without the knowledge of the sheriff, placed a sum of money which he had received in a drawer in his bedroom there. Some days afterwards he died; and his widow, having found the money, removed it and deposited it with her solicitors, the sheriff remaining in ignorance of its existence. Subsequently an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of the judgment debtor's estate in bankruptcy. The sheriff, having learned of the existence of

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the above-mentioned sum of money, claimed it from the solicitors, and, interpleader proceedings having been taken, an order was made for the trial of an issue whether the trustee under the administration order was entitled to the money as against the execution creditor:—

Held (reversing the judgment of Lawrance J.), that there was no seizure by the sheriff before the death of the judgment debtor; and that, after his death, the sheriff could not seize the money; and consequently it belonged to the trustee as against the execution creditor.

APPEAL from the judgment of Lawrance J. upon an interpleader issue. (1)

The following was an agreed statement of the facts of the case. On September 19, 1906, Johnson obtained judgment against Pickering for 9542*l.* 7*s.* and 5*l.* 6*s.* costs. On November 12, 1906, a writ of fieri facias was delivered to the sheriff of Yorkshire, and on November 13 the sheriff, in the execution of the writ, went into possession at Heathfield Garforth, the residence of the judgment debtor, and seized the goods of the judgment debtor then in and upon the premises. On November 14, 1906, the judgment debtor received at Wakefield about 400*l.*, proceeds of the sale of some sheep belonging to him and sold by him on that day at Wakefield Market, and also the sum of 210*l.*, the proceeds of a cheque drawn by him on his account with the Lancashire and Yorkshire Bank, which cheque was cashed, and the proceeds handed to the judgment debtor by his secretary on November 14, 1906. The sheep were not at Heathfield Garforth at or after the time when the sheriff went into possession.

The judgment debtor, after making certain payments, placed 395*l.* in notes, the balance of the said moneys, in a drawer in his bedroom at Heathfield Garforth on his return there. The judgment debtor died suddenly on November 21, 1906. After his death his widow discovered the 395*l.* in the drawer, and on November 22 she took the same to Messrs. Ford & Warren, her solicitors and the solicitors of her late husband, without the knowledge of the sheriff's officer who was in possession at the house.

On December 14, 1906, an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of the estate

(1) See [1907] 2 K. B. 437.

of the judgment debtor in bankruptcy upon a creditor's petition presented on November 22, 1906, and on December 27, 1906, the claimant Norton was appointed trustee under the order, and his appointment was duly certified by the Board of Trade on December 31, 1906.

The sheriff went out of possession at Heathfield Garforth on December 12, 1906, having then realized and sold the furniture and effects therein.

Messrs. Ford & Warren held the 395*l.* to abide the order of the Court in this case.

On its coming to the knowledge of the sheriff that the 395*l.* was in the hands of Messrs. Ford & Warren, he took out an interpleader summons, on which an order was made on January 24, 1907, that, Messrs. Ford & Warren agreeing to hold the 395*l.* in their hands to abide further order, the parties should proceed to the trial of an issue in the High Court, in which the claimant Norton should be the plaintiff and the execution creditor Johnson should be the defendant, and that the question to be tried should be whether the sum of 395*l.* in the hands of Messrs. Ford & Warren was the property of the claimant as against the execution creditor.

At the trial of the issue before Lawrance J. he held that there had been what was equivalent to seizure of the bank notes by the sheriff before the making of the administration order, and therefore the trustee under that order was not entitled to the goods as against the execution creditor.

E. Tindal Atkinson, *K.C.*, and *Longstaffe*, for the claimant. It was held in *Hasluck* v. *Clark* (1) that an administration order under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order, and only vests the property of the deceased in the trustee, subject to all rights and liabilities which attached to it in the hands of the deceased. There is, therefore, no relation back to an act of bankruptcy under such an order. The question, therefore, is whether the execution creditor had, before the making of the administration order, obtained a title to these bank notes under the execution as against the judgment debtor.

(1) [1899] 1 Q. B. 699.

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If not, the claimant is entitled to them under the administration order. At common law money and bank notes and securities for money, such as are referred to in the Judgments Act, 1838, s. 12, were not the subject-matter of seizure under a fieri facias. At common law all goods of the judgment debtor in the bailiwick of the sheriff to whom the writ was directed were bound from the date of the teste of the writ. This having been found to lead to great inconvenience, by the Statute of Frauds (29 Car. 2, c. 3), s. 16, it was provided that the goods should only be bound from the time of the delivery of the writ to the sheriff; and by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, it was provided that the writ of fieri facias should not prejudice the title to goods acquired by any person bona fide and for valuable consideration before the actual seizure of the goods by virtue of the writ, provided he had not, when he acquired such title, notice that the writ had been delivered to the sheriff: and now by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26, it is provided that the writ of fieri facias shall bind the property in the goods as from the delivery of the writ to the sheriff, provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless he had, at the time when he acquired his title, notice that the writ had been delivered to, and remained unexecuted in the hands of, the sheriff. By s. 62, sub-s. 1, of the last-mentioned Act things in action and money are not included in the term "goods." Neither the common law rule on the subject, nor the provisions of the above-mentioned statutes, can apply to moneys or bank notes, which were not at common law the subject of execution by fieri facias: *Collingridge* v. *Paxton*. (1) By s. 12 of the Judgments Act, 1838, it is provided that by virtue of any writ of fieri facias the sheriff "may and shall seize and take any money or bank notes, whether of the Governor and Company of the Bank of England or of any other bank or bankers, and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out," and may and shall pay or deliver to the party suing out such

(1) (1851) 21 L. J. (C.P.) 39.

execution any money or bank notes which shall be so seized or a sufficient part thereof, and may and shall hold any of the other securities mentioned as a security for the amount directed to be levied by the writ. The effect of a fieri facias in the case of moneys or bank notes depends entirely on that provision, which says nothing concerning any binding of them from the date of the delivery of the writ to the sheriff, but merely gives him power to seize and take the money or notes. Until such seizure the money is free, and, unless seized before the making of the administration order, it would pass to the trustee under that order. The sheriff knew nothing of this sum of money, which was not on the premises when he entered into possession, until after it had been removed from the premises. No doubt the practice in such cases is for the sheriff to seize some article as representing all the effects of the execution debtor on the premises, indicating thereby his intention to seize all such effects. But there could be no intention to seize what was not there at the time. The words "seize and take" in s. 12 import an intention to take possession by way of execution. The sheriff could have no such intention as regards this money when he seized the goods, because it was not there at the time, and at no subsequent time could he have had any such intention. A person cannot be said to "take" a thing if some one without his knowledge puts it into a drawer in his possession and afterwards takes it out again without his ever having known that it was there. Under these circumstances the claimant is entitled to the money as against the execution creditor. *South Staffordshire Water Co.* v. *Sharman* (1), on which the learned judge in the Court below relied in arriving at the conclusion that there had been a seizure of this money by the sheriff, does not really touch the present case. In that case it was held that the possession of land carries with it the possession of a thing on the land as against a person having no better title, though the owner of the land does not know of the thing's existence. But that doctrine is not really applicable to this case. The property of the execution debtor, even in the goods seized under the fieri facias, is not divested until the sale of those

(1) [1896] 2 Q. B. 44.

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goods. The placing by him of his own money in his own drawer could not constitute a seizure and taking of it by the sheriff. [They also cited *Woodland* v. *Fuller* (1); *Gladstone* v. *Padwick*. (2)]

H. T. Kemp, K.C., and *E. Shortt*, for the execution creditor. First, if a seizure was necessary in order to establish the title of the execution creditor, there was what was equivalent to seizure by the sheriff of this money before the making of the administration order; and, secondly, no seizure was necessary if the right to seize it existed. The money was placed in a drawer which had been seized by the sheriff, and which remained in his possession; and by placing the money in the drawer the execution debtor placed it in the sheriff's possession, as much as if he had given it into his hands. Furthermore, the money of an execution debtor in the bailiwick of the sheriff is as much bound by the delivery of the writ to the sheriff as his goods; for the reasonable construction of the Judgments Act, 1838, s. 12, is that, in providing that money may be seized under a fieri facias, it means that money shall be subject to the same incidents as goods in respect of such a writ. It is clear from *Hasluck* v. *Clark* (3) and *Woodland* v. *Fuller* (1) that the trustee under an administration order made under the Bankruptcy Act, 1883, s. 125, only takes the property of the deceased subject to the same liabilities and other incidents as would have attached to it in the hands of the deceased. This money could have been seized if it had still been in the hands of the execution debtor, and therefore it is still subject to seizure in the hands of the trustee.

E. Tindal Atkinson, K.C., in reply. The Judgments Act, 1838, s. 12, does not in terms put money in the same position as goods for the purposes of a fieri facias, and it is impossible to suppose that the Legislature intended to place money, which is not earmarked, and passes from hand to hand, in that position. Upon the view contended for by the execution creditor there would be no protection for an innocent person receiving money or bank notes bona fide and for valuable consideration after the delivery of the writ to the sheriff, for the terms of the protective sections relating to purchasers of goods would not apply.

(1) (1840) 11 A. & E. 859. (2) (1871) L. R. 6 Ex. 203.
(3) [1899] 1 Q. B. 699.

[FARWELL L.J. Must not the money which may be seized under s. 12 be money belonging to a living person against whose effects a fieri facias has been sued out? It is difficult to see how money can be said to belong to a person who is dead.]

That would appear to be the true construction of the section. [He cited *Ex parte Williams, In re Davies.* (1)]

FLETCHER MOULTON L.J. The circumstances out of which this case arises are of a peculiar nature. They are fully stated in the report of the case in the Court below in the *Law Reports*, and I do not propose to recapitulate them. The first point made before us on behalf of the execution creditor was that there was in effect a seizure by the sheriff of the money placed in a drawer on the premises where he was in possession, and subsequently removed therefrom. Assuming that the actual seizure of the money is the critical question in this case, in my opinion there was no such seizure by the sheriff. At the time of the seizure by the sheriff of the goods the money was not on the premises, and the sheriff, while in possession, never knew of its being brought on or taken off the premises, and did no act whatever which could, in my opinion, be called a "seizure" or in a legal sense would answer to that term.

But the decision of the case does not appear to me to turn on the special circumstances connected with the bringing of this money on the premises, but on broader considerations based on the provisions of the statutes regulating execution by writ of fieri facias. The statutory provisions which relate to the effect of that writ, so far as concerns this case, appear to me to fall into two lines. The first of these relates to goods, and shews successive modifications of the original common law rule as to the effect of a fieri facias. At common law the issue of a writ of fieri facias bound all the goods of a judgment debtor within the bailiwick of the sheriff to whom it was directed, in such wise that the judgment debtor could not in any way dispose of them so as to defeat the right of the execution creditor. This state of the law was found to produce great inconvenience; and accordingly by the Statute of Frauds that rule was altered, and

(1) (1872) L. R. 7 Ch. 314.

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it was provided that the binding of the goods should date from the delivery of the writ to the sheriff. There was a subsequent modification of the rule by the Mercantile Law Amendment Act, 1856; and, ultimately, all the previous enactments on the subject were swept away by the Sale of Goods Act, 1893, s. 26 of which provides that the time of the delivery of the writ to the sheriff shall be the time from which the goods are bound. That Act contains certain clauses for the protection of bona fide purchasers to which I need not refer for the purposes of this case. The second class of statutory provisions relates to money, notes, cheques, &c. Neither by the common law nor by any Act prior to the Judgments Act, 1838, could money or any chose in action be seized by the sheriff under a fieri facias. But by the Judgments Act, 1838, s. 12, it is provided as follows. [The Lord Justice then read the section.]

It will be observed that there is nothing in the language of this section which in any way refers to rules then in force as regards the effect of a fieri facias on goods by virtue either of the common law or of any statute, or which indicates any intention to put money and the other valuables specified in the section on the same footing as goods with regard to execution. It imposes upon the sheriff a new duty, and gives to him a new power, namely, to seize money and choses in action. I think that the object of the section must be ascertained from the language used, the effect of which is sufficiently clear. Giving the best attention that I can to its terms, I have come to the conclusion that it does what it says—it gives to the sheriff a right to seize money and the other things referred to, and, after such seizure, to exercise the remedial powers specified in the section; but I can find in it no suggestion of anything analogous to the binding of goods from the date of the teste of the writ, as at common law, or from the time of the delivery of the writ to the sheriff, as under the Statute of Frauds and other statutes. The Legislature for sufficient reasons has chosen to treat the seizure of money and choses in action by itself in the language of this section, which has never been changed by any subsequent statute. Therefore, in my opinion, until the sheriff seizes, there is no right or charge or lien, or whatever is the

proper term to use, in favour of the execution creditor which binds money of the execution debtor within the bailiwick as there is in the case of goods.

In the present case the sheriff did not know of the existence of this money till after the death of the execution debtor. I think I must take it from the agreed statement of facts that, as soon as the sheriff did get to know about this money, he claimed it; and, as at that time it was within his bailiwick, if the judgment debtor had still been alive, this money must, I think, have been given up to the sheriff, who would then have had all the powers of s. 12 with regard to it. But the judgment debtor was then dead, and an administration order had been made under s. 125 of the Bankruptcy Act, 1883. I am satisfied that the effect of the decision in *Hasluck* v. *Clark* (1) is that the property which vests under the administration order in the trustee, and is to be administered for the benefit of the creditors of the deceased, is the property of the deceased, subject to any liabilities and rights which attached to it in his hands. If I were of opinion that, as against the execution debtor, any actual charge or lien, or right of that kind, as regards this money existed by virtue of the Judgments Act, 1838, s. 12, and the writ of fieri facias, I should have been disposed to think that the contention of the execution creditor was correct, and that we should be obliged to regard the property to be administered under the administration order as being the total property of the execution debtor as diminished by this right; but, as I have said, in my opinion the right as regards money in such a case is merely a right to seize it under the writ of fieri facias, and, having regard to the terms of s. 12, I think that right dies upon the death of the execution debtor. When he is dead, the money, which before was his property, belongs to his personal representatives, and no longer answers the description of "money belonging to the person against whose effects such writ of fieri facias shall be sued out"; and it is too late for the sheriff to do any act by way of seizing it. The money is therefore part of the estate as if the sheriff had never had or exercised any right against it. For these reasons I think the appeal must be allowed.

(1) [1899] 1 Q. B. 699.

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FARWELL L.J. I agree. There can be no doubt since the decision in *Hasluck* v. *Clark* (1) that "the estate of the deceased debtor" for the purposes of s. 125 of the Bankruptcy Act, 1883, is the property which belonged to that debtor subject to all subsisting charges and rights which attached to it. The sole question here appears to be whether the power given to the sheriff by s. 12 of the Judgments Act, 1838, operated so as to constitute a subsisting right with regard to the money in question in this case. I agree in thinking that it did not. The phrase "money belonging to the person, &c.," in s. 12 of the Judgments Act, 1838, is singularly inappropriate if used by way of description of money which had belonged to a person at the time of his death, but which upon his death vested in his legal personal representatives. But, apart from any mere verbal criticism, I am greatly influenced in coming to the conclusion at which I have arrived by the extraordinary length to which the right contended for on behalf of the execution creditor might be pressed. If his contention is correct, I do not see why the sheriff could not seize all the money or bank notes, or other securities for money, which the trustee under the administration order might have collected within the sheriff's bailiwick as the result of the realization of the estate of the deceased, and so defeat the distribution of it among the creditors. I think there must be some limit to the power of seizure given by the section to the sheriff; and I agree with the view that upon the terms of the section the right is limited to money belonging to a living person against whose effects the writ of fieri facias has been issued.

BUCKLEY L.J. I agree that this appeal must be allowed. I must say, however, that I arrive at that conclusion with some hesitation and difficulty, because the appellant succeeds, not on any ground which his counsel put forward in support of the appeal, but on a ground which was suggested for the first time by the Court, and with regard to which we have not been able to obtain much assistance from counsel. The point, however, having been raised, we have to deal with it, and in my opinion

(1) [1899] 1 Q. B. 699.

the result is that the appeal must succeed. The facts are short and simple. On November 13, 1906, the sheriff, in the execution of a writ of fieri facias issued upon a judgment against one Pickering, entered upon the premises belonging to the judgment debtor, and took possession of the goods upon those premises. Subsequently a sum of money was brought upon the premises. It is not disputed that, if the sheriff had known of the existence of this sum of money, it would have been his right, and also his duty, under s. 12 of the Judgments Act, 1838, to seize it for the benefit of the execution creditor. He did not, however, know of its existence. The judgment debtor died suddenly on November 21; and his widow having found the money, took it away and lodged it with her solicitors, in whose hands it remains, they having undertaken to hold it until this case is decided. The sheriff in due course sold the goods seized, and went out of possession on December 12, remaining in ignorance of the existence of the sum of money in question. On or about December 27 he appears to have discovered the facts as to the money, and thereupon to have made a claim to it. The question is whether he is now entitled to seize it for the benefit of the execution creditor.

Apart from the cardinal question which has been raised with regard to the effect of the judgment debtor's death upon the power given to the sheriff by s. 12 of the Judgments Act, 1838, I should have thought that, so soon as the sheriff learned of the existence within his bailiwick of property of the judgment debtor other than that which he had already seized, namely, money available for the purpose of satisfying the judgment under the writ of fieri facias, he would have a right to seize it, which right would have subsisted on December 14, when the administration order was made; and that order would not, in my opinion, have affected the right of the sheriff to exercise his statutory duty with regard to this money for the benefit of the execution creditor. The case of *Hasluck* v. *Clark* (1) seems to me to be in point as shewing that, as regards this sum of money, the property to be administered under the order was the money, subject to the right of the execution creditor to have it seized by the sheriff in execution of the judgment. That view is confirmed by the case of *Woodland*

(1) [1899] 1 Q. B. 699.

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v. *Fuller* (1), in which the sheriff seized the property after the making of a vesting order by the Insolvent Debtors' Court. But the cardinal question to which I have alluded remains to be dealt with, namely, whether, the judgment debtor having died, and no seizure of this money having up to the date of his death been made by the sheriff, the language of s. 12 of the Judgments Act, 1838, is sufficient to enable the sheriff to seize in December the money, which in December was not the money of the deceased man, but of those persons who derived from him a title to it as his representatives. I appreciate the fact that the terms of the section leave room for argument as to the exact meaning of the words "belonging to the person against whose effects such writ of fieri facias shall be sued out"; and that it may be contended that they may apply to money which belongs to the judgment debtor, and which is therefore exposed to the consequences of execution, at the time when the writ of fieri facias is sued out, and are not necessarily confined to money which belongs to him at the time when the seizure is made. But, forming the best judgment that I can, I think that the words must be construed as meaning what my brothers say they mean, i.e., money belonging to a living person, and not money which has belonged to a person who is dead, when the power of seizure is exercised.

Appeal allowed.

Solicitors for claimant: *Ward, Bowie & Co., for W. & E. H. Foster, Leeds.*

Solicitors for execution creditor: *Burton, Yeates & Hart, for Luke White, Driffield.*

(1) 11 A. & E. 859.

E. L

[IN THE COURT OF APPEAL.]

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Oct. 15, 16.

MACBETH *v.* NORTH AND SOUTH WALES BANK.

Cheque—Forged Indorsement—Payee—"Fictitious Person"—Belief or Intention of Drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

W., by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged K.'s indorsement to the cheque and paid it in to his own account with the defendant bank, who credited him with the amount and collected the money from the C. Bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company:—

Held (affirming the judgment of Bray J.) that, as K. was an existing person designated by the plaintiff and intended by him to be the payee of the cheque, the payee was not a "fictitious person" within s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for the conversion.

Vinden v. *Hughes*, [1905] 1 K. B. 795, approved.

Appeal by the defendants from the judgment of Bray J. (1)

The action was brought to recover damages for the conversion of a cheque. The facts, which are fully stated in the judgment of Bray J., were shortly as follows:—

The plaintiff's claim was for damages for the conversion of a cheque, or alternatively for money had and received to the plaintiff's use. The facts, which are stated at length in the judgment, may be summarized as follows: One White, by falsely representing to the plaintiff and his brother-in-law, one Irvine, that he had agreed to buy from a man named T. A. Kerr 5000 shares in a company called White's Carriage Company at 2*l.* 5*s.* per share, and that he had arranged to resell the shares to a syndicate for 2*l.* 10*s.* per share, induced the plaintiff and Irvine to agree to assist him in financing the transaction. For the purpose

(1) [1906] 2 K. B. 718.

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of paying Kerr for the shares the plaintiff drew a cheque on his bank, the Clydesdale Bank, for 11,250*l.*, payable to Kerr or order, which cheque was sent by him to Irvine for him or White to hand to Kerr in exchange for the scrip and transfer of the 5000 shares. Irvine accordingly handed the cheque to White, in order that he might hand it to Kerr in exchange for the scrip and transfer of the shares. Instead of so doing White forged Kerr's indorsement to the cheque and paid it into his own account with the defendant bank, who credited him with the amount and obtained payment of the cheque from the Clydesdale Bank. White had in fact never agreed to buy any shares from Kerr, and Kerr did not hold any shares in White's Carriage Company. Subsequently to receiving the cheque White sent to the plaintiff certificates for 5000 shares which he had induced the secretary to the company to give him, partly, by producing forged transfers from Kerr. These certificates were deposited by the plaintiff with the Clydesdale Bank as security for an advance made by the bank for the purpose of the transaction. As soon as the plaintiff discovered that White had forged the indorsement to the cheque, he repudiated the transaction and commenced this action.

Bray J. gave judgment for the plaintiff.

The defendants appealed.

Rufus Isaacs, K.C., *Maurice Hill*, and *Hugh Beazley*, for the defendants. The cheque was not the property of the plaintiff. It was drawn by him for the purpose of being dealt with in a joint transaction between Irvine, White and the plaintiff, and the plaintiff sent it to Irvine, and Irvine handed it to White for the purpose of White dealing with it on the joint account in a joint venture. But assuming that the cheque was the plaintiff's, and that the defendants are liable for having converted it, the plaintiff has only suffered nominal damages. The cheque was handed to White for the purpose of paying for and receiving 5000 shares in White's Carriage Company. White, in fact, obtained from that company and sent to the plaintiff 5000 shares in the company. Those shares the plaintiff received in satisfaction of the cheque wholly or to the extent of their value.

Further, Kerr was a fictitious person within the meaning of

s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and the cheque may be treated as payable to bearer. Therefore it did not require indorsement, and the forgery is immaterial so far as the defendants are concerned. It is true that there was a T. A. Kerr living near Manchester, but he, in fact, had nothing to do with this transaction, although White represented that he had. Kerr was therefore fictitious as regards this transaction. *Bank of England* v. *Vagliano Brothers* (1) is in the defendants' favour. In that case Petridi & Co., although existing persons, had nothing to do with the transaction, and were therefore held to be fictitious payees within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882. So in the present case Kerr was a fictitious payee. He never could have become entitled to the cheque drawn by the plaintiff. The intention of the plaintiff would have been the same if Kerr had never existed. Where the person named as payee has no existence with reference to the transaction, he is fictitious within the meaning of s. 7, sub-s. 3, of the Act of 1882. It is clear from the judgment in *Bank of England* v. *Vagliano Brothers* (1) that the fact that a person is in existence and is a real person does not prevent s. 7, sub-s. 3, of the Act of 1882 applying. The judgments in *Clutton* v. *Attenborough* (2) shew that s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, applies, although the drawer of the cheque has no knowledge that the payee is a fictitious or non-existing person. The judgment in *Vinden* v. *Hughes* (3) was founded on a misapprehension of the decision in *Bank of England* v. *Vagliano Brothers*. (1) There is nothing in *Vinden* v. *Hughes* (3) which detracts from the authority of the observations in *Bank of England* v. *Vagliano Brothers*. (1) It is admitted that defendants are not in a position to rely on the protection afforded by s. 82 of the Bills of Exchange Act, 1882.

Horridge, K.C., and *Leslie Scott*, for the plaintiff, were not called upon.

LORD ALVERSTONE C.J. In this case the defendant bank placed to the credit of White a cheque for the sum of 11,250*l.*, which

(1) [1891] A. C. 107. (2) [1897] A. C. 90.
(3) [1905] 1 K. B. 795.

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had been drawn by the plaintiff payable to Kerr or order. White had forged Kerr's name, and had then paid the cheque in and had the benefit of it in his account with the defendant bank. It was admitted by counsel for the defendant bank that the bank was not in a position to rely on the protection afforded by s. 82 of the Bills of Exchange Act, 1882. But on behalf of the defendant bank three points were raised. First, it was said that the plaintiff could not sue in respect of the trover or conversion of the cheque, or for the money, the proceeds of it, because it was a cheque that was drawn for a joint purpose, viz., with the object of the plaintiff, White and Irvine becoming interested in shares in White's Carriage Company. In my opinion, so far as the defendant bank is concerned, the view taken by Bray J. is correct, and that point fails. It was the plaintiff's cheque which was to be dealt with in a specific way, and, assuming that any right of action exists for wrongfully dealing with the cheque, the plaintiff is the only person entitled to bring the action.

The second point made on behalf of the defendant bank was that, assuming the bank to be liable on the ground that it had converted the cheque, no damage had arisen, because the plaintiff had obtained 5000 of White's shares, which it was intended he should have, or at any rate that the bank ought not to pay 11,250*l.*, but only that amount less the value of the shares. I am unable to see how the defendant bank is entitled to raise that point. The only parties before the Court are the plaintiff and the defendant bank. Bray J. has pointed out in his judgment that, inasmuch as the plaintiff did not ratify White's fraud, but repudiated the transaction with regard to the shares, he can have no claim to them; but that fact does not enable us to say that the defendant bank is entitled to the benefit of those shares. There may be persons who have claims in respect of those shares who are not before the Court. The most that can be said is that possibly the defendant bank may have some right in respect of the shares against some one, but that is not a question which we can determine in this action. Neither the original owners of the shares, White's representatives, nor the Clydesdale Bank were before the Court. The second point therefore fails.

That leaves the third question, which raises a very important point, for determination, viz., whether or not the defendants are entitled to treat the cheque as a cheque payable to bearer on the ground that Kerr is a fictitious or non-existing person within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882. Whatever view may be held as to the weight of judicial opinion in *Vagliano's Case* (1), we are bound to apply the principle to be collected from the judgments of the House of Lords in that case. I quite agree with the observation made by Warrington J. in giving judgment in *Vinden* v. *Hughes* (2), to the effect that if certain expressions in the judgments in *Vagliano's Case* (1) are taken alone and consideration is not given to the subject-matter to which they were addressed, it may be that the language used supports the contention on behalf of the defendant bank that because Kerr had no connection with the transaction at all, and his name was really introduced by White for the purpose of White's fraud, he (Kerr) might be regarded as being a non-existing person. I agree that the question as to a fictitious or non-existing person cannot be answered by simply asking if there is some one who corresponds with the name. The name of some distinguished person might be inserted in a bill, but he might be a fictitious or non-existing person for the purpose of the section we have to consider.

In my opinion the view taken by Warrington J. in *Vinden's Case* (2), and by Bray J. in the present case, is correct. In giving judgment in *Bank of England* v. *Vagliano Brothers* (1) Lord Herschell said: "In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee . . . ."

I call attention to the words "intended by the drawer," because it must be remembered that the point in *Vagliano's Case* (1) was whether the acceptor was entitled to say that the payee was not fictitious or non-existent for the purposes of his, the acceptor's, own protection. It is very important to remember that in *Vagliano's Case* (1) the instrument was a bill of exchange in the ordinary sense of the word, and the point raised was raised by the acceptor. The acceptor of a bill protects the credit of the drawer

(1) [1891] A. C. 107. (2) [1905] 1 K. B. 795.

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of the bill. It does not matter in the least to the acceptor who the payee is. When a bill of exchange is presented to a person for acceptance, the drawer asks him to honour his signature as drawer and to accept the bill, and the credit of the drawer may be partially protected even though the acceptor does not choose to go the full length of accepting the bill. Therefore, in dealing with a payee of a bill in the ordinary sense of the word, very different considerations from a commercial and mercantile standpoint arise to those which arise when the particular form of a bill of exchange which is called a cheque upon a bank is being dealt with. It is for that purpose that it is so important to see whether, in the terms formulated by Lord Herschell, the payee designated in the bill is a real person intended by the drawer to receive payment by himself or by some transferee. It is the drawer who selects and inserts the name which is put in the body of the bill as being the payee's name. Therefore, if the person who inserted the name in the bill knew that the person was fictitious or non-existent, then the consequences follow that the bill may be treated as against the acceptor (if I may use the expression) as being a bill to bearer, with the consequences pointed out in *Vagliano's Case*. (1)

It must not be forgotten that a cheque upon a banker is treated as a bill of exchange only by virtue of the law merchant and s. 73 of the Bills of Exchange Act, 1882, which says that a cheque is a bill of exchange drawn upon a banker payable upon demand. In ordinary parlance there is no acceptor to a cheque. The bank which pays the money alone stands in the position of the acceptor. If the bank gives credit it simply honours the cheque and pays the money.

Applying Lord Herschell's test, we must consider whether, in any given case, when the drawer of a cheque inserts a payee's name, he intends the payee to receive payment by himself or by some transferee from him; in other words, whether he intends that the payee who has to indorse the cheque payable to order shall receive payment. In the present case it is not disputed that so far as the plaintiff Macbeth is concerned there was a real transaction. He got his bank to advance this money and drew his

(1) [1891] A. C. 107.

cheque, intending that there should be a real sale, as he believed, by a man named Kerr, of the 5000 shares in White's Carriage Company. It is not suggested that the plaintiff had the least idea that any one would receive the proceeds of the cheque except a person named Kerr—an existing person bearing that name—who, by the fraud of White, he had been induced to believe did possess the 5000 shares. Although Kerr had had some shares in the company, at that moment he had none at all. It seems to me that if I put to myself the question, "Is this an ordinary case where the payee designated in the cheque is a real person intended by the drawer of the cheque to receive payment?" there can be but one answer, viz., that the person who inserted the name did not insert the name of a fictitious person in the sense of a person who he knew had no connection with the transaction. He did not put in the name of a non-existing person, but he put in the name of a person from whom, as he believed, the shares were coming, and to whom alone the money was to go.

I am therefore of opinion, following the point decided in *Bank of England* v. *Vagliano Brothers* (1), and taking the test laid down by Lord Herschell in that case, that the judgment of Bray J. is correct. I might make the same observations with regard to the passages in the judgments of Lord Halsbury L.C. and Lord Macnaghten, but no useful purpose would be served by repeating them. I have endeavoured to state what appears to me to be the real decision in *Bank of England* v. *Vagliano Brothers* (1) and its bearing upon the present case. On behalf of the defendants the decision in *Clutton* v. *Attenborough* (2) was relied upon. If I found anything in *Clutton* v. *Attenborough* (2) which led me to believe that the House of Lords meant to construe the judgments in *Bank of England* v. *Vagliano Brothers* (1) as applying to the case of a drawer of a cheque who has inserted the name of a person believing it to be that of a real person and the transaction a genuine one, and who was induced to do so by the fraud of another person, of course the authority, although we might not have been bound by it, would have been a very strong justification of the view urged on behalf of the defendants.

(1) [1891] A. C. 107. (2) [1897] A. C. 90.

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Lord Alverstone C.J.

It is, however, impossible to take that view in the face of what Lord Halsbury decided. The judgments in that case proceeded throughout upon the basis that Brett, the payee of the cheque, was a non-existing person. The summary of the facts states that "There was no such person as George Brett." That statement does not mean, of course, that there was no person whose name was George Brett. I myself am aware of the fact that there are persons bearing that name, one of whom I know. The statement means that the case was argued upon the basis of George Brett being a non-existing person, and this point obviously being in the mind of the members of the House of Lords, Lord Halsbury says: "Whatever might have been said in *Vagliano's Case* (1), where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words 'fictitious' and 'non-existing,' it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a non-existing person. Why am I, upon this very plain and manifest state of facts, to inquire into what would be the case if there was a person, as there was in *Vagliano's Case* (1), who might plausibly be represented as the person intended by the drawer to be the person to whom the payment was to be made?" The great importance of that passage is that Lord Halsbury L.C. adopted the expression used by Lord Herschell in the passage in his judgment in *Bank of England* v. *Vagliano Brothers* (1), to which I have referred, when he used the words "the person intended by the drawer to be the person to whom the payment was to be made"—or, in other words, he indicated that the state of circumstances which gives rise to the question whether the person can be regarded as fictitious or non-existing depends upon the intention of the person who inserts the name. Immediately that is appreciated, whether the decision in *Vagliano's Case* (1) be approved of or not, the broad distinction between the two cases becomes apparent. Then Lord Halsbury L.C. followed up what he had said by adding: "In this case no such question arises at all." Therefore it cannot be

(1) [1891] A. C. 107.

said that in *Clutton* v. *Attenborough* (1) Lord Halsbury recognized as regards a cheque the argument urged by the defendant based upon *Vagliano's Case*. (2)

With regard to *Vinden* v. *Hughes* (3), which is not binding upon us, Warrington J. appears in that case to have taken the true view of *Vagliano's Case* (2) and of *Clutton* v. *Attenborough* (1), and, if I may say so with great respect, I entirely agree with the judgment of Warrington J. in *Vinden* v. *Hughes* (3), and I could not hope to express the reasoning better. He, having taken the words of Lord Herschell in *Bank of England* v. *Vagliano Brothers* (2), says: "He"—the drawer—"had every reason to believe, and he did believe, that those cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." In the present case it is not disputed that the plaintiff believed the cheque was being drawn for the purpose of being paid to an existing person named Kerr, in a transaction which he believed to be genuine, and which, so far as he was concerned, had no element of fictitiousness about it. In my opinion, therefore, notwithstanding the most interesting and able argument on behalf of the defendants, our judgment ought to be in accordance with the opinion of Bray J. and Warrington J., and the judgment for the plaintiff must stand.

BUCKLEY L.J. In my opinion the judgment of Bray J. was right upon all points. Upon the first point I add nothing. The second point is this: On behalf of the defendants it was contended that the damages for the conversion of the plaintiff's cheque for 11,250*l.* ought to be limited by the fact that the plaintiff acquired 5000 fully-paid shares or certificates for them. In my opinion that fact does not affect the damages in any way. As Bray J. pointed out in the Court below, the plaintiff does not claim any title to the shares. But, even upon the assumption that he does, the way in which the case strikes me is this—the question is not whether the plaintiff is entitled to 5000 shares, but whether the defendant bank can say that he is not entitled

(1) [1897] A. C. 90. (2) [1891] A. C. 107.
(3) [1905] 1 K. B. 795.

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to 5000 shares. They may have some rights of subrogation. As to that I say nothing. But the point is this: The plaintiff meant to buy 5000 shares from Kerr. Kerr was to have had the money. White stole the money, and it never reached Kerr. Some one or other—some other vendor, I suppose—transferred or purported to transfer (whether rightly or wrongly I do not know) 5000 shares to the plaintiff. It may be that as between the plaintiff and that other person the plaintiff cannot keep them. That other person is not here. We cannot adjudicate upon the rights as between the plaintiff and the owner of those shares. We have no one here but the plaintiff and the defendant bank. It seems to me that the plaintiff is entitled to recover from the bank 11,250*l.*, the proceeds of the cheque which it converted, and that the question whether he is entitled to the 5000 shares as between himself and the person who was the transferor of those shares is a matter which does not concern the defendants.

The third question is that upon which I wish to say a few words, because it is of importance under the Bills of Exchange Act, 1882. The language of s. 7, sub-s. 3, of that Act is: "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." Two different states of fact are contemplated by that sub-section—the one is that the payee is fictitious, the other that he is non-existent. Existence or non-existence of a particular person is a question of fact, not relevant to anybody's mind or intention. "Fictitious" is different. A thing can only be fictitious relatively to some one. There can be no action without an actor, no pretence without a pretender, and no fiction without a feigner. Fiction is necessarily relative.

What is meant by "fictitious" in this connection? I think it means fictitious by the pretence of some person who is a party to the instrument. The relevant point in the present case is that Kerr was not fictitious by any pretence of the plaintiff. The plaintiff made no pretence. He feigned nothing. He was deceived. He thought Kerr had shares, but Kerr had no shares. The plaintiff had a real intention of paying 11,250*l.* to a person whom, it is true, he had never seen, but who

existed in fact, and to whom he meant to pay 11,250*l.* as the price of the shares. In my opinion Kerr was, for no relevant purpose, fictitious. The whole effect of *Bank of England* v. *Vagliano Brothers* (1), for the purposes of the present case, seems to me to be this—that, as Lord Macnaghten said, the bills when they came before Vagliano for acceptance were wholly fictitious. The drawer, the payee, and the person indicated as agent for presentation were all fictitious. When Vagliano accepted that instrument he accepted the responsibility of becoming liable upon the document—such as it was—having regard to, amongst other things, s. 7, sub-s. 3, of the Bills of Exchange Act, 1882. He rendered himself liable to pay the bill drawn as it was by a person who forged the name of the drawer, and inserted a fictitious payee. When Vagliano accepted that, he made himself responsible upon an instrument which, by the operation of the Act of 1882, was necessarily to be treated as being payable to bearer. If that is the true meaning of *Vagliano's Case* (1) I need not add anything to shew it has nothing to do with the present case.

On behalf of the defendants we have been pressed with the decision of the House of Lords in *Clutton* v. *Attenborough.* (2) Having regard to the expressions of Lord Halsbury, it is clear that he was not deciding the point which we have now to decide. It appears to me there is a difference in substance between the two cases. If the drawer of a cheque chooses to take the responsibility of drawing it to a non-existent person, no doubt the result of the statute is that he cannot complain because the cheque is not indorsed. That is the whole of the decision in *Clutton* v. *Attenborough.* (2) In my opinion that has no relevance to the meaning of the word "fictitious," which I have endeavoured to shew involves an investigation into the mind of the drawer of the bill. I find in the judgments in *Vagliano's Case* (1)—I refer in particular to Lord Herschell's judgment on pp. 151 to 153 inclusive—that again and again the intention of the drawer is pointed to as being relevant. It seems to me that it is a cardinal fact. Was the drawee a fiction to the drawer? If he was, then he is a fictitious person. It seems to me that the present case

(1) [1891] A. C. 107. (2) [1897] A. C. 90.

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is not governed by *Bank of England* v. *Vagliano Brothers*. (1) On the contrary, I think it is governed by the decision of Warrington J. in *Vinden* v. *Hughes* (2), which in my judgment was rightly decided, and that Bray J. was right in the view he took. For these reasons I think that this appeal fails and must be dismissed.

KENNEDY L.J. I am of the same opinion. My Lord and Buckley L.J. have so fully dealt with all the points that there would be no use in my adding anything.

Appeal dismissed.

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for plaintiff: *Weightman, Pedder & Weightman, Liverpool.*

J. E. A.

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Oct. 17.

WESTGATE *v.* CROWE.

County Court—Practice—Nonsuit—Costs—Limits of Judge's Discretion as to—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 88, 93, 113.

In an action in the county court where the judge is satisfied upon the plaintiff's case that the defendant is not liable, he has no power to enter a nonsuit, but ought to give judgment for the defendant.

Semble, that if in an action in the county court the judge finds that the plaintiff has sued the wrong party, it is not a ground for depriving the successful defendant of his costs that, having the necessary information to enable the plaintiff to ascertain who was the proper party to be sued, he neglected to give it to the plaintiff.

APPEAL from the Lowestoft County Court.

The action was against the committee of a dog show for personal injuries caused by the fall of an advertisement board from premises where the show was going to be held on to the footpath of a public street on which the plaintiff was walking. The board was the property of third parties. At the close of the plaintiff's case the judge nonsuited the plaintiff. He said he was satisfied that the defendants were not responsible for the

(1) [1891] A. C. 107. (2) [1905] 1 K. B. 795.

advertisement board being left where it was, and that the persons liable to be sued, if anybody, were the owners of the board. But he deprived the defendants of costs, upon the ground that he did not consider that they had given every assistance and information to the plaintiff to enable her to determine who was the proper party to be sued. The defendants appealed.

Poyser, for the defendants. The judgment ought to have been, not a nonsuit, but a judgment for the defendants with costs. By s. 93 of the County Courts Act, 1888, the power of the judge to nonsuit is confined to cases "in which satisfactory evidence shall not be given entitling either the plaintiff or defendant to judgment," in which, that is to say, the case is not proven. If the judge is satisfied that the defendant is not liable, he is bound to enter judgment for the defendant. An appeal will lie from an order as to costs if the grounds upon which the judge purported to exercise his discretion were manifestly insufficient grounds. It may be that if he is silent as to the grounds upon which he proceeded this Court could not interfere, but if he gives a bad ground, so that his exercise of discretion was not a judicial one, an appeal lies.

Lilley, for the plaintiff. The judgment of nonsuit was not wrong. Sect. 88 of the County Courts Act says that if the plaintiff "shall not make proof of his claim to the satisfaction of the Court it shall be lawful for the judge to nonsuit the plaintiff or to give judgment for the defendant." It is in that event optional for the judge to enter either form of judgment. A plaintiff does not the less fail to make proof of his claim to the satisfaction of the Court if he satisfies the Court that the defendant is not liable. The greater includes the less.

Secondly, the Court cannot interfere in the present case with the exercise of the judge's discretion as to costs. He thought that the defendants' conduct justified him in depriving them of costs. The case of *Harnett* v. *Vise* (1) shews that the judge may look at the conduct of the parties previous to the litigation. No doubt he cannot deprive a party of costs merely because he does something which the judge disapproves of, but which the party has a perfect

(1) (1880) 5 Ex. D. 307.

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right to do, as where the defendant successfully pleads the Statute of Limitations: *Elms* v. *Hedges* (1); or the Gaming Act: *Granville* v. *Firth* (2); or insists upon the case being tried by the ordinary procedure instead of submitting it to the judge as an arbitrator: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3) But where the judge thinks that a party has unreasonably done or abstained from doing something, whereby he has led to the litigation, he has materials upon which to exercise a discretion over the costs, and from that exercise no appeal will lie. If the defendants here had informed the plaintiff who the owners of the board were, the action would never have been brought.

PHILLIMORE J. In this case an action was brought in the county court for personal injuries, and the judge, after hearing the plaintiff's case, found that the defendants were not liable, but that certain other persons, if any, were the parties responsible for the accident. He might have found that the plaintiff had not proved her claim to his satisfaction, and if he had done so he might properly have entered a judgment of nonsuit in accordance with the provisions of ss. 88 and 93 of the County Courts Act, 1888. Such a judgment still leaves it open to the plaintiff to bring another action, just as it did in the Superior Courts before the passing of the Judicature Acts. But the facts as found here by the judge went to shew that the plaintiff could not have brought a second action against the same defendants, for he found that the evidence of the plaintiff's witnesses not only failed to establish the liability of the defendants, but went on to establish that the liability, if any, rested upon other persons. Under those circumstances he ought to have entered judgment for the defendants. Instead of doing so he entered judgment of nonsuit, and he went on to deprive the defendants of costs upon the ground that they had not given the plaintiff the necessary information to enable her to ascertain who were the proper parties to be sued. We have no means of knowing whether the judge would have exercised his discretion differently and have given the defendants their costs if he had realized that the proper judgment was a judgment for the

(1) (1906) 95 L. T. 145. (2) (1903) 19 Times L. R. 213.
(3) [1903] 2 K. B. 756.

defendants and not one of nonsuit. As we have now to give the proper judgment, we ought to direct judgment to be entered for the defendants, and to annex to that judgment the ordinary incident that the defendants should have their costs. This makes it unnecessary for us to decide whether, if the judge had entered judgment for the defendants, as he ought to have done, and had nevertheless deprived them of costs, it would have been a proceeding with respect to which we could have interfered upon appeal. That an appeal lies on a question of costs is clearly shewn by the cases of *Elms* v. *Hedges* (1) and *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2) The deprivation of a party of his costs, if upon a ground not warranted by law, is "a determination of the judge in point of law" within the meaning of s. 120 of the County Courts Act. A county court judge, like a judge of the High Court, has a discretion over costs, and if there are materials upon which he can exercise his discretion he cannot be overruled on appeal. But if there are no materials upon which the discretion can be exercised, or if he exercises it upon grounds which are not open to him, an appeal lies. It is no doubt difficult to say where the dividing line is to be drawn between such a case as *Harnett* v. *Vise* (3)—where in an action of libel the conduct of the plaintiff previous to the publication of the libel sued on was held sufficient to justify the judge in depriving the successful plaintiff of his costs—and such cases as *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2), *Granville* v. *Firth* (4), and *Elms* v. *Hedges.* (1) It may be said, perhaps, with reference to *Harnett* v. *Vise* (3), that the position of a plaintiff who initiates the litigation is more open to criticism than that of a defendant who is dragged into it against his will. But, be that as it may, it is clear that it is no ground for depriving a defendant of costs that he relied upon a defence which he was entitled by law to set up, such as the Statute of Limitations or the Gaming Act, or that he refused to submit to the judge as an arbitrator to say what should be done in the matter and insisted upon having the case tried according to law. And it seems to me that the cases in which it was so decided are

(1) 95 L. T. 145.
(2) [1903] 2 K. B. 756.
(3) 5 Ex. D. 307.
(4) 19 Times L. R. 213.

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nearer to the present case than is that of *Harnett* v. *Vise*. (1) But I prefer to rest my decision upon the ground that the judge, in giving a judgment of nonsuit, gave the wrong judgment. The appeal must be allowed.

WALTON J. concurred.

Appeal allowed.

Solicitors for plaintiff: *J. B. & F. Purchase, for Blake, Lowestoft.*

Solicitors for defendants: *Gibson & Weldon, for Watson & Everett, Lowestoft.*

J. F. C.

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Oct. 16, 18.

CORPORATION OF LIVERPOOL *v.* PETER WALKER & SON, LIMITED.

Licensing Acts—Extinction of Licence—Compensation—Division of Compensation Money among Parties interested—Principle of Computation—Determination by County Court—Appeal—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where a county court judge exercises the jurisdiction conferred by s. 2, sub-s. 3, of the Licensing Act, 1904, an appeal lies from his decision.

The respondents, brewers, were tenants to the appellants of certain licensed premises at a peppercorn rent. The lease contained no covenant by the tenants to keep the licence on foot. While the lease had still some years to run the licence was extinguished under the Licensing Act, 1904, and the aggregate amount of the compensation for non-renewal payable to the parties interested in the licensed premises was determined by the Commissioners of Inland Revenue. On an inquiry before the county court judge as to the proportion in which the respondents and the appellants respectively were entitled to share in that money, evidence was given that, in the absence of any special circumstances, the average price paid for freehold licensed premises in the open market represented twenty-five years' purchase of the rental value. Evidence was also given that the respondents had upon an average of years made at least 8 per cent. profit on the beer supplied by them to the house. The

(1) 5 Ex. D. 307.

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judge held that, having regard to the profits which the respondents had lost, it was reasonable to calculate the present values of the parties' respective interests upon the 8 per cent. interest table, and he accordingly awarded to the respondents a sum equal to the present value of an annuity for the residue of the lease of such an amount as would represent the interest on the compensation money if invested at 8 per cent., and he awarded to the appellants the balance, namely, a sum which, if invested at 8 per cent. and allowed to accumulate at compound interest during the residue of the lease, would be equal to the amount of the compensation money. On appeal:—

Held, that the rate of profits which the respondents had previously made was not material to the inquiry, and that the judge, in computing the values of the parties' interests upon the 8 per cent. table, had acted on a wrong principle; that the absence of a covenant to keep the licence on foot did not expose the licence, or the appellants' interest in it, to any unusual risk; and that, there being no reason to suppose that the property would depreciate during the lease, the 4 per cent. interest table was the proper one on which to compute the parties' respective shares in the compensation money.

APPEAL from the county court of Liverpool.

Peter Walker & Son, Limited, brewers, were tenants to the corporation of Liverpool of a beerhouse situate at 8, Bridgwater Street, under a lease for a term of seventy-five years from March 4, 1852, at a peppercorn rent. The lease contained a covenant to repair the premises, but no covenant to keep the licence on foot. The house was sublet by Peter Walker & Son to one Ann Jordan, the licence-holder, upon the terms of the usual covenant binding her to sell no liquors upon the premises other than those of her immediate lessors. In 1906 the licence was extinguished under the provisions of the Licensing Act, 1904, and in January, 1907, the Commissioners of Inland Revenue determined the amount of the compensation for non-renewal payable to the parties interested in the licensed premises at 603*l.* The division of that amount between the licence-holder, Peter Walker & Son, and the corporation was referred by the borough justices under s. 2, sub-s. 3, to the county court. It was agreed between Peter Walker & Son and the corporation that 75*l.* should be paid to the licence-holder by them rateably out of the shares to which they should be held to be entitled, and the only question in dispute before the county court judge was as to the proportion in which they, the lessees and lessors, were respectively entitled to share. Evidence was given by

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valuers called on behalf of the lessors that twenty-five years' purchase of the annual value is the normal price which freehold licensed premises fetch on the market. Of the valuers called by the lessees one put the average price at from twenty to twenty-five years' purchase according to circumstances, and the other, while admitting that first-class licensed property might fetch twenty-five or even as much as twenty-nine years' purchase of the annual value, in the case before the Court put the capitalized value at twenty years' purchase, in consequence of the fact that there were a very large number of licensed houses in the district, and that the risk of any particular licence being extinguished under the Act of 1904 was consequently great. Evidence was also given that the lessees had previously made 60*l.* a year profit on the beer supplied by them to the house under the tied covenant. The judge, however, thought that it was reasonable to assume that over a long period of years it would not average more than 48*l.*, which would represent 8 per cent. on the capital value of 603*l.* He accordingly computed the present value of their respective interests upon the 8 per cent. interest table, and upon that basis came to the conclusion that the lessees were entitled to 483*l.* and the corporation to 120*l.* Deducting from those figures the parties' rateable proportion of the 75*l.* agreed to be paid to the licence-holder, he awarded 105*l.* to the corporation and 423*l.* to Peter Walker & Son.

Peter Walker & Son were also tenants to the corporation of a fully licensed house at 24, Raffles Street, under a lease at a peppercorn rent for a term of which there were forty-six years unexpired in 1906, when the licence was extinguished under the said Act. The lease, as in the former case, contained a covenant to repair, but no covenant to keep the licence on foot. The house was conducted by the lessees themselves through a manager. The Commissioners of Inland Revenue fixed the amount of the compensation money at 1147*l.* The question of the division of that sum was, as in the former case, referred to the county court judge, who held that the calculation of the respective interests should be upon the 8 per cent. table, and accordingly he awarded 1110*l.* to Peter Walker & Son and 37*l.* to the corporation. The corporation appealed.

Sir Robert Finlay, K.C., and *Leslie Scott*, for the corporation. The compensation money was apportioned by the county court judge between the lessees and the lessors upon a wrong principle. He adopted the 8 per cent. table, because the profits which the lessees had lost by the extinction of the licence represented 8 per cent. upon the capital value of the licence as assessed by the Commissioners of Inland Revenue. But the amount of the profits which a brewer makes out of the purchase of a lease of licensed premises has no bearing upon the value of his interest in them; it is only material as supplying a motive for his competing for them in the market against other purchasers. Upon the question of the rent which a tenant would be willing to pay for the premises it is material to inquire into the quantity and quality of the trade done by the house under normal conditions, as was laid down by Kennedy J. in *Ashby's Cobham Brewery Co.'s Case* (1), but not into the profits which the brewer tenant would make. The rent which a tenant would be willing to pay in anticipation of making profits is one thing; the amount of the profits which he would make is another. Those profits would depend upon the manner in which he conducts his business. There is no distinction in this respect between a liquor shop and any other shop. If then the consideration of the brewers' profits be excluded in the present inquiry, there was no reason suggested why the 8 per cent. table should be adopted. The question whether one interest table should be adopted rather than another depends solely upon the degree of soundness of the security. But the evidence went to shew that under normal conditions the market value of licensed premises is twenty-five years' purchase of the rental. The experts who were called apparently attached no importance to the omission from the leases of a covenant to keep the licences on foot, and did not regard it as giving to the premises an abnormal character. They treated the licences as perfectly sound securities. The proper table, therefore, upon which to compute the apportionment is the 4 per cent. table. Upon that basis, in the case of the beerhouse in Bridgwater Street, after deducting the 75*l.* agreed to be paid to the licence-holder, there will be payable to

(1) [1906] 2 K. B. 754.

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the lessees, Peter Walker & Son, the sum of 287*l.* 4*s.*, and to the lessors, the corporation of Liverpool, the sum of 240*l.* 16*s.* In the case of the fully licensed house in Raffles Street there will be payable to the lessees the sum of 958*l.* 4*s.*, and to the lessors the sum of 188*l.* 16*s.*

From the decision of the county court judge in this matter an appeal lies to this Court under s. 120 of the County Courts Act, 1888.

Cripps, K.C., and *F. E. Smith*, for the respondents. There is no appeal from the decision of the county court judge on the division of the compensation money, even if the subject of that decision is to be treated as a question of law. The Licensing Act, 1904, does not give the county court an independent jurisdiction; it merely authorizes the compensation authority to refer the matter to the county court judge as their delegate. His decision when given becomes the decision of the compensation authority. It is so treated throughout the County Court Rules, 1905, which are added to Order L. If the division of the money had been made by the whole body of the justices for the borough there would have been no appeal, for no right of appeal is given, and though the justices might state a case if they chose, there is no means of compelling them to do so. It cannot be that if the justices elect to refer the matter to the county court an appeal is given which would not exist if they determined it themselves.

But even if there is an appeal on a question of law, this is not a question of law. The question of the quantitative proportion of the two parties' interests is one of pure fact. In order to arrive at the proper proportion of the two parties' shares in the aggregate compensation assessed, you must first ascertain what their respective interest was in the property of which they have been deprived. And for the purpose of ascertaining that you must take into consideration precisely the same elements which are properly taken into consideration by the Commissioners when assessing the aggregate sum. And, according to the decision in *Ashby's Case* (1), one of the most important factors to be taken into consideration by the Commissioners is the amount and quantity of the liquors supplied to the house, from which "the

(1) [1906] 2 K. B. 754.

possible purchaser will be able to estimate the profit which may reasonably be attributed to the house." To that extent it is clear that the brewer's profits arising from the control of the house are not excluded from consideration when the matter to be determined is the value of the lease of licensed premises. Therefore the judge here was quite right in looking at the profits made. Whether he has put the rent which the brewer tenant would pay in anticipation of those profits at too high a figure, and whether in capitalizing that rent he has adopted the wrong table, may possibly be open to question. But even assuming that he has, that does not involve any question of law. Whether a brewer's interest in a lease of licensed premises is to be treated as an 8 per cent. or a 4 per cent. investment is a question of fact, and nothing more. Further, there was not enough here to shew that the 8 per cent. table was wrong. It is necessary to consider the conditions on which the lessee holds, and to look at the terms of his lease: *Bourne* v. *Liverpool Corporation* (1); *In re Chandler's Wiltshire Brewery Co. and London County Council.* (2) If those terms are peculiarly advantageous to the lessee or detrimental to the interests of the lessor, the lessee's share in the compensation ought to be proportionately higher and the lessor's lower. The experts improperly left out of consideration the fact that the brewers here were not under covenant to keep up the licence. It is no answer to say that they would presumably do so for their own protection. For it might well be to their interest to surrender the licence with the view of transferring their business to other and more convenient premises not belonging to the same lessors. The risk of their exercising that power must necessarily affect the value of the reversion, and it cannot be right to treat a public-house licence under such circumstances as an absolutely certain security.

Sir Robert Finlay, K.C., in reply. If the judge here had merely decided that the 8 per cent. table was applicable because the licence in question was an inferior security which was not worth more than twelve and a half years' purchase, his decision would have been one of fact, and no appeal would have lain. But he did not adopt that table on that ground. Nor could he rightly

(1) (1863) 33 L. J. (Q.B.) 15. (2) [1903] 1 K. B. 569.

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have done so in view of the evidence that a licensed house is worth twenty-five years' purchase in the market.

PHILLIMORE J. The first point to be determined in this case is whether there is any appeal from the county court judge sitting under s. 2, sub-s. 3, of the Licensing Act, 1904, even on the assumption that the matter decided by him was one of law; the next point is whether the matter so decided was one of law; and thirdly, if the two former questions are to be answered in the affirmative, we have to say whether his decision was right or wrong.

I am of opinion that there is an appeal from the county court when sitting under the section in question. The Act provides that the division of the compensation which has been assessed by the Commissioners of Inland Revenue may be undertaken by the quarter sessions, or it may be referred by them to the county court. In this case the quarter sessions did so refer it. Now if the matter had remained in the Court of quarter sessions there would no doubt have been no appeal in the ordinary sense of the term, but it is not disputed that the sessions might have stated a case for the opinion of the High Court, and that if they had they would have been bound by that opinion when expressed. No doubt they could not be compelled to state a case, but it is agreed that if the question in dispute was one of law they ought to state it; and therefore if this is a question of law, and if it had been determined by the quarter sessions, it would presumably have reached this Court. That then being the condition of things, if the matter had remained before the quarter sessions, what was it intended should be done if the matter went to the county court? From the county court when exercising its jurisdiction under other statutes, if there is no express provision in the statute to the contrary, there is an appeal to the High Court. When the Legislature said that the quarter sessions might remit the matter to be dealt with by the county court, did they mean that the judge was to decide the matter without appeal, or did they mean that the ordinary incidents of the county court jurisdiction should apply? They could easily have said that he should decide it without appeal. A provision of that kind is not

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at all uncommon in modern Acts of Parliament, but this Act contains nothing of the kind. Probably the reason why an opportunity is given of sending the matter to the county court is that the quarter sessions sits only for a few days, and is moreover an unpaid tribunal, and it may have been thought that if the matter was going to be a troublesome one, involving a lengthy and difficult investigation, it might be better that it should be dealt with by one of the ordinary civil Courts of the country. But, whether that be so or not, I can see no reason why the Legislature should have intended the matter to be decided by the county court without appeal. There being no provision to that effect either in the Act of 1904 itself or in the rules made under the Act, it must be presumed to have been intended that an appeal should lie under s. 120 of the County Courts Act. The first point then must be decided in favour of the appellants.

The other two points may be conveniently dealt with together. If the county court judge's decision is one of fact, there is no appeal; if the decision is one of law, there is an appeal; but if the decision is right, that appeal fails.

The question is as to the proportions in which certain sums of money, which have been assessed by the Commissioners of Inland Revenue as compensation to all the parties interested in certain licensed premises, should be divided amongst the several parties. How those aggregate sums have been arrived at we do not know, but we are bound to assume that they were arrived at according to the principles laid down by Kennedy J. in *Ashby's Case* (1), and that the Commissioners took into consideration the fact that brewers would give a higher rent for the premises than other people by reason of the opportunity which the possession of the premises would afford them of pushing the sale of their liquors with covenants "tying" the house. The aggregate sum has to be divided between the freeholder, the leaseholder, and the licence-holder. The claims of the licence-holder might give rise to difficult considerations. But, fortunately, no question arises with regard to him in the present case. As between the freeholder and the leaseholder, the money must be divided according to the contractual relations between the parties. If there is

(1) [1906] 2 K. B. 754.

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nothing in the lease or in the character of the property to lead to the value of the property being lessened by the time the reversion falls in, the division will be according to the extent and duration of the respective interests. I say "extent," because if there is an annual rent the reversioner has a present interest. Here the rent is a peppercorn rent only, and the case is more simple. If, on the other hand, the nature of the lease is such that the leaseholder during his term will or may consume or waste some of the property, so that when the reversion falls in it will not be so valuable, the reversioner will upon the division get a smaller share, and the leaseholder consequently will get a larger share. It has been suggested in the present case that there were matters which made the property somewhat of a wasting nature; but I do not think that the county court judge based his decision on that view, and the evidence and argument in support of the contention are both rather shadowy. All licensed property is exposed to risks. According to the case of *Sharp* v. *Wakefield* (1), there are cases in which a renewal may be refused notwithstanding that the house has been well conducted. In one of the two cases before us, that of the premises in Bridgwater Street, which had been licensed as a beerhouse before 1869, the rule of *Sharp* v. *Wakefield* (1) does not apply. Even in the case of such a beerhouse there are certain conditions the breach of which may lead to a forfeiture of the licence, but there is no reason why that breach should be expected to occur during the currency of the term rather than at a subsequent date. One suggestion made on behalf of the lessees with respect to the beerhouse, the lease of which had still twenty years to run, was that the premises were old and were getting into such a condition that the annual renewal of the licence was not likely to last beyond the twenty years; though why the licensing authority should interpose on the ground of structural defect in the twentieth year rather than in the twenty-first counsel did not explain. Though there was no covenant by the tenants to keep the licence in force, there was a covenant to repair the premises, and it certainly did not lie in the mouth of the tenants to suggest that the licence might be taken away because of a structural defect, which it was their duty under the covenant to

(1) [1891] A. C. 173.

prevent from arising. I can conceive a case where a contractor for some great works, which he knew would take some three years to complete, took a lease of licensed premises for three years. If the licence were extinguished during his lease he would be able to shew, when the compensation money came to be divided, that the assessment must have been partly based upon the large profits which he would have made during the residue of the term, and therefore he was entitled to a larger share of the fund than a tenant would be entitled to under ordinary circumstances. In this particular case no consideration of that nature arises, and we have a perfectly simple case to deal with. A particular sum which has been ascertained by the Commissioners has got to be divided. That sum might conceivably by agreement between the parties be left in the hands of a trustee and invested, so that the leaseholder would receive the interest during the term, after the expiry of which the capital would be handed over to the reversioner. But the Act does not contemplate that; it contemplates an immediate division. The sum then being immediately divisible must be, in my opinion, divided in such proportions as will give the leaseholder the present value of an annuity for the number of years that the lease has to run, and give the reversioners the present value of the deferred capital, the interest on which will produce the annuity. Those are figures which there would be no difficulty in arriving at when once you have got the necessary factor of the rate of interest on which the present values are to be calculated. What, then, is that rate of interest? The answer is that it must be taken to be that which is the usual rate in this country for money forborne when the security is ample, and no part of the interest is required for insurance against risk. And that rate must be taken as not exceeding 4 per cent. As the appellants here are content that it shall be calculated at as high a rate as 4 per cent., it is not necessary to consider whether in this case it should be 3 per cent. or something between that and 4 per cent. It is abundantly clear that for all ordinary purposes of calculation the present value of a reversion well secured is rightly taken on the 4 per cent. tables. What the county court judge, however, did was to take the rate of interest at 8 per

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cent., upon the ground, apparently, that the normal rate of a brewer's profit was at least 8 per cent. In my opinion the county court judge was wrong, and this appeal should be allowed.

WALTON J. I agree. In estimating the difference between the value of these licensed premises and the value which they would bear if unlicensed, the Commissioners of Inland Revenue had to take into account, amongst other things, the profits which were made by the lessees, as brewers, on the beer supplied by them. But there is no evidence to shew precisely how the Commissioners arrived at their estimate of 603*l*. That sum, however, so arrived at has to be divided between the lessors and the lessees, and for the purpose of that division the rights of each party under the lease must be considered. It was contended for the lessees that they were not bound to keep up the licence; and that that fact would render the value of the lessors' reversion precarious. I think the county court judge was right in inferring that the Commissioners acted upon the assumption that, but for the extinction, the licence would have continued in existence. I do not think that the absence of the covenant in question was a matter that could properly affect the rights of the parties upon the division of the compensation money. Where the judge, in my opinion, went wrong was in thinking that because for the purpose of arriving at the aggregate sum the lessees' profits, as brewers, were rightly taken into consideration, they ought also to be taken into account for the purpose of deciding the proportions in which that sum was to be divided between the lessors and lessees. I do not think the profit made by the brewers was material or relevant to the latter inquiry. It seems to me that the county court judge has gone wrong in a matter of law in respect of which there is a right of appeal, and that his decision must be reversed.

Judgment for appellants.

Solicitors for appellants: *Venn & Co., for Town Clerk, Liverpool.*

Solicitors for respondents: *E. Berry & Co., Liverpool.*

J. F. C.

[IN THE COURT OF APPEAL.]

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RICHARDSON AND OTHERS *v.* GRAHAM.

Light—Prescription—Dominant and Servient Tenements united in One Freeholder—Extinguishment of Easement—Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

Unity of seisin for an estate in fee will not cause an easement of ancient light to be extinguished where there is no unity of possession and enjoyment.

A tenement which had enjoyed the access and use of light over an adjoining tenement for a period of twenty years without interruption was leased for a term of years to the plaintiffs. Subsequently and during the continuance of this term the freeholder conveyed the tenement in fee to the freeholder of the servient tenement:—

Held, that the easement acquired by the tenement under s. 3 of the Prescription Act, 1832, was not thereby extinguished.

APPEAL from the decision of Pickford J.

The defendant was the owner in fee of a freehold block of land in Middlesbrough. The freeholder of the adjoining land was a person named Eadie, and he had let the property to the plaintiffs on a lease for seven years from June 23, 1903, with the option of renewing for three years more. This property had acquired under the Prescription Act a right to the access and use of light over the adjoining land by user without interruption for more than twenty years. In 1905 the defendant began to build upon his land, and his building admittedly interfered with the access of light to the premises occupied by the plaintiffs, and on March 5, 1906, they issued the writ in the present action claiming an injunction and damages. On March 29, 1906, Eadie conveyed to the defendants the freehold in the premises occupied by the plaintiffs under the lease.

The action was tried at the Durham Assizes before Pickford J. and a special jury. The plaintiffs abandoned their claim for an injunction, and the jury awarded 150*l.* as damages, of which 10*l.* represented the damage sustained by the plaintiffs before March 29, 1906, and 140*l.* the prospective damage for the remainder of the lease.

The defendant contended that, as both the dominant and

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servient tenements became united in the defendant on March 29, 1906, the easement of light was then extinguished, and the plaintiffs were therefore only entitled to damages in respect of the injury sustained by them up to that date.

Pickford J. overruled this contention and entered judgment for the plaintiffs for 150*l.*, and the defendant appealed.

Manisty, K.C., and *Mundahl*, for the appellant. It is a general principle of law that unity of seisin in the dominant and servient tenement extinguishes an easement, and it makes no difference whether there is unity of possession or not: Goddard on Easements, 6th ed. p. 555; *Buckby* v. *Coles* (1); *Simper* v. *Foley*. (2) It is the union of the freeholds that extinguishes the easement, and it is immaterial that the dominant tenement was on lease at the time of the unity of seisin. The right to light was attached to the premises, and did not pass by the lease in any sense: *Robson* v. *Edwards*. (3) *Frewen* v. *Philipps* (4) does not alter this principle of law, and deals with the acquisition, and not the extinguishment, of easements. *Robson* v. *Edwards* (3) simply followed that decision, and laid it down that where a right to light is acquired by one tenant of a common landlord over the land of another tenant of the same landlord, and there is a subsequent surrender and new lease of the servient tenement, the right to light goes on in regard to the new tenancy. If it were otherwise, it would be a derogation from the landlord's own grant. *Fear* v. *Morgan* (5) is another case of a common landlord.

Scott Fox, K.C., and *G. F. Mortimer*, for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. In this case one Eadie, who was the freeholder of the premises in question, had granted a lease of them to the plaintiffs which would practically last till 1913. The defendant, who was the owner in fee of the adjoining land over which the premises occupied by the plaintiffs had acquired a prescriptive right to light, built a house upon it which materially interfered with the access of light to the plaintiffs' premises. This action

(1) (1814) 5 Taunt. 311.
(2) (1862) 2 J. & H. 555.
(3) [1893] 2 Ch. 146.
(4) (1861) 11 C. B. (N.S.) 449.
(5) [1906] 2 Ch. 406; [1907] A. C. 425

was commenced, and after the commencement of the action Eadie conveyed the fee simple of the premises to the defendant. The judge at the trial was asked to say that the damage sustained by the plaintiffs after this conveyance had been executed could not be recovered because the fee simple in the dominant and servient tenements had united, and therefore extinguished the easement.

The argument depends on the question whether the case is governed by the general proposition laid down in Goddard on Easements, 6th ed. p. 555: "Unity of seisin for estates in fee will in every case cause easements to be extinguished, and it matters not that there has been no unity of possession and enjoyment, as, for instance, that one tenement has been in possession of a tenant during the whole period of unity, for, notwithstanding that, extinction will be effected." For this proposition *Buckby* v. *Coles* (1) is given as the authority. The passage in Gale on Easements, 7th ed. p. 488, is not stated in such general terms: "In *Buckby* v. *Coles* (1) the Court of Common Pleas intimated a decided opinion, that unity of seisin was sufficient to work an extinguishment, without actual unity of occupation. In *Drake* v. *Wiglesworth* (2), the Court doubted whether seisin implied possession; but it should seem, from a more recent case, that from seisin the law will presume possession." I doubt whether this statement was intended to apply to possession in fact where the landlord has granted a lease of two adjoining tenements, or where the easement is one of necessity.

It is true that in *Buckby* v. *Coles* (1) there does occur the passage (3), "The Court expressing a decided opinion that the prescriptive right of way was extinguished by the unity of seisin, without adverting to the unity of occupation, he abandoned the verdict on the second and third issues." That is, however, all. In that case there was an action for trespass, and the defendants set up a prescriptive right of way. Macdonald C.B. at the trial expressed the opinion that the prescriptive right of way, if it ever existed, was not extinguished by mere unity of seisin, and that to extinguish a right of way there must be unity of enjoyment.

(1) 5 Taunt. 311. (2) (1752) Willes, 654.
(3) 5 Taunt. at pp. 315, 316.

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Lord Alverstone C.J.

A rule was obtained on the ground of misdirection, and the Court expressed the opinion which I have just read.

The other authority which is supposed to recognize the principle laid down in Goddard on Easements is *Simper* v. *Foley*. (1) There Page Wood V.-C. said (2): "I apprehend it is clear that the effect of an union of the ownership of dominant and servient tenements for different estates is not to extinguish an easement of this description, but merely to suspend it so long as the union of ownership continues; and that upon a severance of the ownership the easement revives." It is contended that the force of those words lies in the phrase "for different estates," but the Vice-Chancellor was not there considering or giving any judgment on a case where there had been a grant by the owner of a dominant tenement of a lease of land which has in fact enjoyed an easement of ancient light attached to it. Here it is found as a fact that this house had at the time of the granting of the lease attached to it a right of ancient light, or, in other words, that it came within the words of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Here there was a tenement where the right of ancient light attached to the house itself. The landlord grants a lease of that house, and so gives the tenant the right to occupy it, for a term of years with the existence of the right of ancient light, and I should have thought that it was impossible for him to derogate from that grant.

Under those circumstances it seems to me impossible to suggest, as has here been suggested, that if the landlord by conveying the fee simple in the dominant tenement to the freeholder of the servient tenement extinguishes the right of ancient

(1) 2 J. & H. 555. (2) 2 J. & H. at p. 563.

light which is attached to the house which he has leased, the tenant's only remedy is by an action on the covenant for quiet enjoyment.

In my opinion the cases go a great deal farther than that. *Frewen* v. *Philipps* (1) and *Robson* v. *Edwards* (2) are authorities to shew that the right of ancient light when once acquired exists against both the owner and the lessee of the servient tenement, even where the owner of the servient tenement is also owner of the dominant tenement.

If the proposition in Goddard on Easements meant that the extinction of the easement is absolute if the fee simple of the dominant and servient tenement coincide, I think that it is too widely stated, and that its recognition might lead to injustice. The pinch of the case against the appellant's contention is the decision in *Robson* v. *Edwards* (2), which was recognized in *Fear* v. *Morgan* (3), that the right to light enures in favour of a lessee not only as against the adjoining lessee, but as against the common landlord and all succeeding owners of the adjoining tenement. I am not prepared to say that the general proposition in Goddard on Easements applies where rights are acquired by grant from an owner of property who subsequently acquires or sells the property over which the rights prevail. I think that it has no application to such a case as that.

In my opinion my brother Pickford was quite right in saying, "If the common ownership does not prevent the acquisition of the right to light, I fail to see why the conveyance should extinguish that right when once it is acquired as against the tenant who is still in possession of the property, unless the conveyance brings with it not only the right of common ownership, but also the right to possession, which it does not do in this case"; and again, "The subsequent conveyance of the property of which the plaintiffs were tenants to the defendant does not deprive the plaintiffs of their right to light and their right to sue for damages for the obstruction of that light."

I think, therefore, that the judgment was right on this point, and that it must be affirmed.

(1) 11 C. B. (N.S.) 449.
(2) [1893] 2 Ch. 146.
(3) [1906] 2 Ch. 406; [1907] A. C. 425.

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BUCKLEY L.J. On March 29, 1906, the plaintiffs were entitled to a leasehold interest for a term of years in the dominant tenement. The reversion in the dominant tenement was in one Eadie. The dominant tenement enjoyed over the servient tenement which was vested in the defendant a prescriptive right to ancient light acquired by user for more than twenty years. On March 29, 1906, Eadie conveyed to the defendant the reversion in the dominant tenement. It is said that the effect of that conveyance was to destroy the easement of ancient light; that is to say, that by acts done by the plaintiffs' lessor and by the owner of the servient tenement the rights enjoyed by the plaintiffs were destroyed.

In my opinion that is not the law. It is inconsistent with reason, with good sense, and with authority. The law as I understand it is this: Unity of seisin does not prevent the acquirement of a prescriptive right to light by one tenant against another tenant of the same landlord: *Frewen* v. *Philipps* (1); *Mitchell* v. *Cantrill.* (2) If as between tenant and tenant there has been created a prescriptive right to light, this right is not lost by a merger of the leasehold interest of the servient tenement in the reversion: *Simper* v. *Foley.* (3) "Where a right," says the Vice-Chancellor (4), "to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against all the world, and, therefore, against the owner of the reversion; consequently, by the merger of the leasehold interest in the reversion of the servient tenement, the rights of the owner of the dominant tenement remain unaltered." The prescriptive right enures against the reversioner of the servient tenement. In *Wheaton* v. *Maple & Co.* (5) Lindley L.J. says: "It was contended that *Bright* v. *Walker* (6) is inconsistent with *Frewen* v. *Philipps* (1); but this is a mistake attributable to the wording of the head-note in the latter case. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both

(1) 11 C. B. (N.S.) 449.
(2) (1887) 37 Ch. D. 56.
(3) 2 J. & H. 555.
(4) 2 J. & H. at p. 564.
(5) [1893] 3 Ch. 48, at p. 65
(6) (1834) 1 C. M. & R. 211.

held under the same landlord. Similar observations apply to *Mitchell* v. *Cantrill* (1) and to *Robson* v. *Edwards*." (2)

This doctrine receives its final crowning stone in the decision in *Fear* v. *Morgan* (3), which was affirmed by the House of Lords (4), where it was held that where one of two lessees of a common landlord has enjoyed the access of light to his tenement for twenty years without interruption, he acquires an indefeasible right to light not only as against the adjoining lessee, but also as against the common landlord and all succeeding owners of the adjoining tenement, as it is too late to disturb the doctrine to this effect established in *Frewen* v. *Philipps*. (5) So that it is perfectly plain on the authorities that if in this case the two tenements had belonged throughout, not to different owners, but to one owner, but the circumstances were such that a lessee of the dominant tenement had acquired a prescriptive right against the servient tenement, the right would have been good as against all the world. It is said, however, that this case is different because there was not a common owner of the dominant and servient tenement during the whole period, but common ownership of the two tenements arose after the right to light had been acquired. This seems to me an extravagant proposition.

I wish to add one word more. If the present case were decided otherwise, *Robson* v. *Edwards* (2) must have been wrong. *Robson* v. *Edwards* (2) was this: Two tenements were held under leases from the same landlord. The lessee of the first enjoyed access of light to his windows over the second tenement for more than twenty years before his lease expired. After the expiration of his lease he continued to hold under an agreement for a lease. The lease of the second tenement was subsequently surrendered, and the landlord granted a lease of it to a new tenant. The common landlord therefore came into possession of the servient tenement, and it was held that the right of the lessee of the first tenement to light was preserved as against him. It is true that he granted another lease of the servient tenement, but that is

(1) 37 Ch. D. 56.
(2) [1893] 2 Ch. 146.
(3) [1906] 2 Ch. 406.
(4) [1907] A. C. 425.
(5) 11 C. B. (N.S.) 449.

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immaterial. Mr. Manisty relies on *Simper* v. *Foley* (1), and says that that case is in his favour. I can find nothing in it to that effect. In *Simper* v. *Foley* (1) it was held that a union of the ownership of the dominant and servient tenements for different estates does not extinguish an easement of light acquired under s. 3 of the Prescription Act, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. I cannot see how that case is any authority for saying that where the unity of ownership is for the same estate there is an extinction of the easement.

The appeal I think fails.

KENNEDY L.J. I am of the same opinion. My Lord and my brother Buckley have gone so thoroughly into the matter in their judgments that I only wish to add that, in my opinion, this case forms a good example of cases where the argument has no reason to support it, but is founded on a statement of too general a kind in a text-book—a statement, in the present case, founded on an isolated passage in the report of the argument of counsel in a case, in the course of which the Court appears to have intervened to express a decided opinion upon a certain point without giving, as far as appears from the report, any reason for it.

It is contended that the passage in Goddard on Easements extends to such a case as the present. If so, the landlord has the right to create a state of things which works injustice. In my opinion a person cannot give to another a right which is not his to give, because he has already disposed of it to somebody else. Here the landlord, having unquestionably given by legal act the right to light to the plaintiffs, cannot give by legal act to another person something which is absolutely inconsistent with that right which he has already granted to the plaintiffs.

Appeal dismissed.

Solicitors for appellant: *Worthington Evans, Dauney & Co., for Mather & Dickinson, Newcastle-on-Tyne.*

Solicitors for respondents: *G. & W. Webb, for Crosby & Crosby, Stockton-on-Tees.*

(1) 2 J. & H. 555.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1907
Nov. 1.

In the Matter of COLMAN and WATSON.

Practice—Appeal—Matter of "Practice and Procedure"—Arbitration—Application to enforce Award in the same Manner as a Judgment—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 1, 12, 27.

An appeal from an order of a judge at chambers upon an application to enforce an award on a submission to arbitration under the Arbitration Act, 1889, is an appeal in a matter of "practice and procedure" within the meaning of the Judicature (Procedure) Act, 1894, s. 1, sub-s. 4.

Appeal from an order made by Pickford J. at chambers as after mentioned.

The respondent Watson, having agreed to take a lease of certain premises from the appellant Colman, subsequently wrote to the latter, stating that he was not prepared to carry out the agreement, and asked in effect to be released from it, offering to pay 50*l.* by way of compensation. The result of further correspondence between the parties was that it was agreed that the amount to be paid to Colman by Watson by way of compensation for releasing him from the agreement for a lease should be fixed by one Martin. Martin having assessed the amount to be paid by the respondent at a certain sum, and that sum not having been paid, the appellant Colman, on the footing that there had been an arbitration and award by Martin within the meaning of the Arbitration Act, 1889, applied by way of originating summons to a Master at chambers for leave to enforce the award under s. 12 of the Act in the same manner as a judgment. The Master granted the application; but on appeal Pickford J. was of opinion that, upon the true construction of the agreement between the parties, it was not a submission to arbitration, but a mere agreement for a valuation, and that consequently the provisions of the Arbitration Act, 1889, did not apply; and he therefore made an order reversing the decision of the Master. Against this order Colman appealed.

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Montague Lush, K.C., and *D. McGarel Hogg*, for the respondent, took the preliminary objection that the appeal did not lie to the Court of Appeal direct, but should have been brought to the Divisional Court in the first instance. It was established by the decisions in *Watson* v. *Petts* (1) and *Long* v. *Great Northern and City Ry. Co.* (2) that "practice and procedure" in the Judicature Act, 1894, s. 1, sub-s. 4, means practice and procedure in a cause or matter in the High Court. There must, therefore, have been a cause or matter already pending in the High Court, in which cause or matter the application in chambers was made, in order that the appeal may be in a matter of "practice and procedure" within the meaning of the sub-section.

[VAUGHAN WILLIAMS L.J. In s. 100 of the Judicature Act, 1873, "matter" is defined as including every proceeding in the High Court not in a cause. In *Ex parte Caucasian Trading Co.* (3) it was held by the Court of Appeal that an application to enforce an award under s. 12 of the Arbitration Act, 1889, was a "civil proceeding in the High Court" within the meaning of s. 1 of the Bankruptcy Act, 1890.]

The Court were not in that case considering the meaning of the language used in s. 1, sub-s. 4, of the Judicature Act, 1894, but the meaning of that used in the Bankruptcy Act, 1890.

[VAUGHAN WILLIAMS L.J. The Arbitration Act, 1889, s. 1, provides that every "submission" shall have the same effect in all respects as if it had been made an order of Court. Must not the submission be deemed to be an order of the Court when the application to enforce the award under s. 12 is made?]

Sect. 1 does not say that the submission is to be deemed to have been made an order of Court. It means merely that the submission, without being made a rule of Court, shall have the same effect for the purpose of giving the Court control of the arbitration as formerly the making of it a rule of Court had. In the case of *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (4), the Court of Appeal held that an appeal

(1) [1899] 1 Q. B. 54.
(2) [1902] 1 K. B. 813.
(3) [1896] 1 Q. B. 368.
(4) [1905] 1 K. B. 366.

against an order directing an arbitrator to state a case was not a matter of practice and procedure in the High Court within the meaning of the Judicature Act, 1894, s. 1, sub-s. 4. They also cited *In re Shaw and Ronaldson* (1); *In re Portland Urban District Council and Tilley & Co.* (2)

THE COURT directed counsel to argue the appeal upon the merits.

Hume Williams, K.C., and *Bremner*, for the appellant, contended that the effect of the correspondence between the parties was that there had been a reference of a matter in dispute, namely, the amount of damages payable by the respondent to the appellant for breach of the agreement for a lease, to Martin as arbitrator, and therefore his award could be enforced under s. 12 of the Arbitration Act, 1889.

D. McGarel Hogg (*Montague Lush, K.C.*, with him), for the respondent, contended that the case was not one in which a matter in dispute between the parties had been referred to arbitration, but merely one in which the parties had agreed that a third person should assess as a valuer the amount which the respondent ought to pay to the appellant as the price of his release from the agreement for a lease. (3)

VAUGHAN WILLIAMS L.J. Having regard to the conclusion at which we have arrived in this case, I do not think that it will be necessary for me to state at any length my decision on the question whether this is an appeal in a matter of "practice and procedure" within the meaning of the Judicature Act, 1894, s. 1, sub-s. 4, so that there is a right of appeal from the judge at chambers to this Court directly, or an appeal in a matter in respect of which the appeal, if there is one, must be to the Divisional Court in the first instance. The words of the

(1) [1892] 1 Q. B. 91.

(2) [1896] 2 Q. B. 98.

(3) The case of *In re Carus-Wilson and Greene*, (1886) 18 Q. B. D. 7, and other cases were referred to in argument, but this point, which turned upon the somewhat special circumstances of the case and the terms used by the parties in correspondence, was not thought to call for a report.

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sub-section are as follows: "In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal." As I understand, it is common ground that, upon the true construction of the words of the sub-section, in order that there may be a right of appeal to the Court of Appeal direct, the appeal must be in a matter of "practice and procedure" in some cause or matter pending in the High Court. In order to answer the question whether, in a case like this, the appeal is in such a matter, one must, in my opinion, refer to the provisions of the Arbitration Act, 1889. By s. 1 of that Act it is provided that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court." Therefore, where there is a submission within the meaning of that section, the case must, I think, be treated as if that submission had been made an order of the High Court. Then, in order to see what is a "submission" within the meaning of the Act, one must turn to s. 27 of the Act, by which it is provided that: "In this Act, unless the contrary intention appears, 'submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." Having regard to these provisions of the Arbitration Act, 1889, I think that, where an application is made under the Act to enforce an award upon a submission in the same manner as a judgment in the High Court, the application must be considered, not as being made as regards a matter outside the jurisdiction of the High Court, but as relating to a matter of practice and procedure in that Court.

That being so, I proceed to consider the terms of the letters relied upon by the appellant as constituting a submission to arbitration in this case, in order to see whether they amount to such a submission or merely to an agreement for a valuation. [The Lord Justice then proceeded to discuss the terms of the letters which had passed between the parties and the circumstances of the case, and arrived at the conclusion that there had been no submission of a dispute to arbitration, but merely an agreement for a valuation of the amount to be paid to the appellant by the respondent for releasing him from the agreement for a

lease; and therefore that the case did not come within s. 12 of the Arbitration Act, 1889, and the appeal must be dismissed.]

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BIGHAM J. concurred.

Appeal dismissed.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondent: *Lewis, Welch & Wenham.*

E. L.

[IN THE COURT OF APPEAL.]

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General Average—Cargo of Coal—Tendency to spontaneous Combustion—"Portions of bulk Cargo" on fire—Water Damage to Cargo in extinguishing—Liability of Ship to contribute in general Average—York-Antwerp Rules, 1890, *r.* 3—*Merchant Shipping Act*, 1894, *s.* 502.

The fact that a peril occasioning a general average sacrifice of cargo is brought about by the inherent vice of the cargo itself does not preclude the cargo owner from claiming contribution in general average unless his conduct in shipping the goods was wrongful or negligent.

Coal was shipped on board the plaintiffs' ship under bills of lading which provided that average was to be adjusted according to the York-Antwerp Rules, 1890, by rule 3 of which "Damage done to . . . . cargo . . . . by water . . . . in extinguishing a fire on board the ship shall be made good as general average; except that no compensation shall be made for damage to such portions of the . . . . bulk cargo . . . . as have been on fire." The coal was stowed in four different holds. While the ship was at sea a fire broke out in three out of the four holds owing to the spontaneous combustion of the coal. The coal was not exceptionally dangerous, and the fire was in no way attributable to any negligence on the part of the shippers. In order to extinguish the fire water was thrown into the holds, whereby so much of the coal as had not been ignited was damaged. In respect of the damage so done by the water the owners of the coal claimed against the ship contribution in general average:—

Held—(1.) That the fact of the coal's liability to spontaneous combustion having been the cause of the fire which necessitated the damage was no answer to the coal owners' claim;

(2.) That the words "such portions of the bulk cargo as have been on fire" in the exception in rule 3 of the York-Antwerp Rules did not refer to physical divisions of the cargo by means of bulkheads, so as to constitute the entire contents of each hold one "portion" within the

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meaning of the rule, but meant so much of the coal on board the ship as had been actually ignited;

(3.) That s. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship . . . . shall not be liable to make good . . . . any loss or damage happening without his actual fault or privity . . . . where any goods . . . . put on board his ship are lost or damaged by reason of fire on board the ship," had no reference to general average contributions, and afforded no defence to the plaintiffs against the coal owners' claim.

APPEAL from a judgment of Channell J. in favour of the defendants.

In April, 1905, Messrs. Andrew Yule & Co. shipped on board the plaintiffs' ship *Knight of the Garter*, at Calcutta for Bombay, 8777 tons of Indian steam coal, under a bill of lading which contained the clause, "Average if any to be adjusted according to York-Antwerp Rules, 1890." (1) The coal in question was loaded in four different holds. Another parcel of coal belonging to other shippers was loaded in a fifth hold. The ship finished her loading on May 3, and finally left the Hooghly river on May 6. On May 9 smoke was observed to be coming from one of the holds, and, as on May 12 two more of the holds containing Messrs. Yule's coals were found to be on fire, the master decided to put in at Colombo. Steam was circulated through the holds, and large quantities of water were poured down upon the coals for the purpose of extinguishing the fire. It was found necessary to discharge the coal, which was done. As owing to the condition of the coal grave risk would have been run by its reshipment, it was decided to abandon the voyage, and the ship eventually proceeded to Bombay in ballast. The fire was caused by spontaneous combustion of the coal, but there was nothing to shew that it was exceptionally combustible, nor were the shippers guilty of any negligence in the shipment of it. The defendants having agreed to be responsible to the plaintiffs for the cargo's proportion of general average, the

(1) York-Antwerp Rules, 1890, r. 3: "Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire."

plaintiffs claimed from the defendants the sum of 497*l.* 2*s.* 1*d.* as being the proportion which Messrs. Yule were liable to pay in general average. The defendants claimed by way of set-off and counter-claim a sum of 814*l.* 6*s.* 7*d.*, leaving a balance due to the defendants of 317*l.* 4*s.* 6*d.* as the ship's proportion of general average contribution in respect of the damage done by the water used in extinguishing the fire to so much of Messrs. Yule's coal as had not been actually burnt. The action was tried before Channell J. without a jury. For the plaintiffs it was contended that the defendants could not claim in general average for the damage to the coal, as the fire which necessitated the damage was due to the inherent vice of the coal itself. Channell J. held that, whatever might be the rule of the general maritime law in that respect, a question which under the circumstances he considered it unnecessary to decide, the contract of carriage by reference to the York-Antwerp Rules expressly stipulated that damage done to cargo by water in extinguishing fire should, however it arose, be made good in general average. He also held that the case did not fall within the exception to rule 3 of those rules, which was only intended to exclude from contribution so much of the coal as was burnt. He further expressed the opinion that, even if the inherent vice of the coal would in other respects have been an answer to the defendants' claim, it was not the inherent vice of the coal which did not catch fire, and for which alone contribution was claimed, that in any way caused the sacrifice. He accordingly gave judgment for the defendants. The plaintiffs appealed.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiffs. The defendants are not entitled under rule 3 of the York-Antwerp Rules to claim in general average for the damage to the coal. Under the general maritime law it has been decided that when the damage which led to the sacrifice was brought about by the fault of the person claiming his claim cannot be allowed: *Schloss* v. *Heriot* (1); *Strang* v. *Scott*. (2) It is contended that there is also a second exception to the right of contribution where the mischief is brought about by the inherent vice of the ship or of the

(1) (1863) 14 C. B. (N.S.) 59. (2) (1889) 14 App. Cas. 601.

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cargo shipped, as the case may be. The same principle ought to be held to apply in the one case as in the other, and the owner of cargo which, having such an inherent propensity, has given rise to the necessity of sacrificing the cargo, although he may not be in fault, ought to be precluded from making a general average claim. In *Pirie* v. *Middle Dock Co.* (1), where a fire broke out spontaneously in a cargo of coals, and portions were thrown overboard and the rest so damaged by water poured on them to extinguish the fire that they had to be discharged and sold at a port of refuge, the question of the coal owner's right to claim contribution did not arise, because the coals, owing to the fact that no freight was payable at the port where they were sold, realized a larger sum than they would have fetched if they had reached their destination; but Watkin Williams J. in his judgment suggested that the cargo might be "not entitled to claim a contribution in general average because it was through its own inherent vice the real cause of the whole misfortune and sacrifice." In Carver on Carriage by Sea, 4th ed. p. 443, it is treated as an open question whether inherent vice without negligence is enough to exclude the claim. If the reason why the party claiming contribution cannot recover where he has been in fault were the desirability of avoiding circuity of action, that would go to shew that the present contention could not be supported. But the case of *The Ettrick* (2) shews that that is not the reason. There the owner of a ship sunk by collision admitted it to be his fault and paid 8*l.* a ton into Court in a suit to limit his liability. The ship and cargo were subsequently raised at the shipowner's expense, who, as a condition of handing over the cargo to the cargo owner, claimed to recover from him a proportion of the expense of raising the ship. It was held that he could not recover it as a general average contribution because he had been in fault, although the cargo owner could not have brought a cross-action against him by reason of the limitation of liability. Then if by the maritime law the inherent vice of the cargo, without any negligence on the part of the cargo owner, prevents him from claiming contribution, the incorporation of the York-Antwerp Rules in the contract cannot better his

(1) (1881) 44 L. T. 426. (2) (1881) 6 P. D. 127.

position. Those rules assume that all the conditions of a general average claim exist, and rule 3 must be read as if the words were "in extinguishing a fire on board the ship not due to the inherent vice of the cargo or the negligence of the shipper." Indeed, rule 18 provides that "Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules." Therefore rule 3 does not apply to the present case at all.

But, secondly, if it is to be treated as applying, the case falls within the exception to the rule, which provides that "no compensation shall be made for damage to such portions of the . . . . bulk cargo . . . . as have been on fire." The words are not "such proportion of the cargo as has been on fire," but "such portions," and that expression must have reference to physical divisions of the bulk cargo by bulkheads. The entire contents of each hold constitute one portion. Here the cargo was in four different holds, and in three of those holds the coal caught fire; therefore the whole of the coal in each of those three holds is excluded from contribution. The defendants are only entitled to claim for the damage to the contents of the fourth hold, none of which got on fire.

Thirdly, the defendants are precluded from claiming contribution in respect of their damaged coal by reason of s. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship . . . . shall not be liable to make good . . . . any loss or damage happening without his actual fault or privity . . . . where any goods . . . . put on board his ship are lost or damaged by reason of fire on board the ship." That language is perfectly general, and extends to protect the shipowner from liability to contribute in general average as well as from liability to an action for damages on the contract of carriage. It is true that Blackburn and Lush JJ. in *Schmidt* v. *Royal Mail Steamship Co.* (1) held the contrary upon the construction of the corresponding section of the Merchant Shipping Act, 1854, but that decision is not binding here.

(1) (1876) 45 L. J. (Q.B.) 646.

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Scrutton, K.C., and *Mackinnon*, for the defendants. The expression "portions of the bulk cargo" in the exception to rule 3 of the York-Antwerp Rules cannot bear the construction which the plaintiffs put upon it. It means so much as has been actually on fire. The ship might have only one hold, in which case it could not be contended that no part of the cargo could be entitled to contribution. Again, the exception refers to portions "of the ship" as well as portions of the cargo. But if the plaintiffs' contention is right, it would be difficult to attach any meaning to the word "portions" as applied to the ship. [They were not required to argue the other points raised by the plaintiffs.]

LORD ALVERSTONE C.J. In this case the plaintiffs' vessel *Knight of the Garter* was loaded at Calcutta for Bombay with 10,000 tons of coal, of which nearly 9000 tons belonged to the particular cargo owner whose interests the defendants represent. The coal, which was stowed in four different holds, was shipped under bills of lading incorporating the York-Antwerp Rules, 1890. A few days after the ship sailed a fire broke out in one of the holds as the result of the spontaneous combustion of the coal. The ship put into Colombo for refuge, and subsequently, in consequence of the fire not being got under and occurring in three holds out of the four, large quantities of water were poured down into the holds, whereby the coal was damaged. And the question in dispute is whether the defendants, as representing the owners of the coal, can claim a general average contribution against the ship in respect of the damage so done. To that claim on behalf of the defendants counsel for the plaintiffs have raised three objections. The first objection, which was not raised in the Court below because in that Court there was a decision binding upon the judge, is based on s. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship . . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity . . . . where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." If that section were an answer to a claim for general average where the cause of the

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sacrifice was a fire, the opportunity of so using it must have arisen in numberless cases. For the provisions of that section have been the law of this country at least as far back as 1786. The language of s. 2 of 26 Geo. 3, c. 86, afterwards repeated in s. 503 of the Merchant Shipping Act, 1854, is practically identical with that of s. 502 of the present Act. But the point was directly decided by Blackburn and Lush JJ. in *Schmidt* v. *Royal Mail Steamship Co.* (1) As that case has stood as law since 1876, we should be wrong to overrule it now even if we thought it wrong. But in my opinion it was quite rightly decided. The section was intended only to relieve the owners from liability to an action for damages, and was not meant to afford any protection against a general average claim.

Counsel for the plaintiffs then relied upon two other points, the most important of which was that, inasmuch as the fire was occasioned by the spontaneous combustion of the coal, although there was no evidence of negligence on the part of the cargo owners or of any person for whom they were responsible, the right to claim in general average was lost. It was contended that by the general maritime law of this country, where the peril occasioning the sacrifice is due to the inherent vice of the cargo shipped, the cargo owner is disentitled thereby from recovering a general average contribution in respect of that sacrifice, and that the incorporation of the York-Antwerp Rules in the bills of lading does not place the cargo owner in a better position. Channell J. seems to have dissented from the latter part of that contention, and to have held that, as by the terms of the contract it was expressly provided that this kind of damage should be made good as general average, it was unnecessary for him to consider whether the main contention was sound. With that view I am unable to agree. I do not think that the inclusion of the York-Antwerp Rules in the contract would prevent us from upholding Mr. Hamilton's main proposition if we thought it in other respects well founded. But in my opinion the maritime law is not as is contended. Speaking for myself, I think we are bound by the principle of one or two decisions to hold that unless there is negligence or some wrong-doing on the part of the

(1) 45 L. J. (Q.B.) 646.

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cargo owner or shipowner, as the case may be, such as would make it inequitable for him to enforce a general average claim, the fact that the original cause of the sacrifice arose from some inherent defect in the cargo or ship is no answer to the claim. It is true that Mr. Carver, whose work on Carriage by Sea I have always regarded as one of the best law-books written in modern times, treats the question as an open one. After stating that the authorities shew that the limitation to the legal right to contribution "applies where the need for the shipowner's sacrifice has been caused by negligence on his part, or on the part of his servants, in properly fitting the ship for the voyage, or in making her seaworthy, or in navigating her," and also "precludes the claim to contribution of a cargo owner, where the danger which has led to a sacrifice of his goods was caused by their unfitness for shipment, if his conduct in shipping them was wrongful or negligent," he goes on to say: "Whether the limitation would apply where the condition of the ship, or of the goods, has produced the danger, but without any negligence on the part of the shipowner, or of the shipper, seems to be more doubtful." (1) But he goes no further than an expression of doubt. For the plaintiffs here reliance was placed on a passage in the judgment of Watkin Williams J. in *Pirie* v. *Middle Dock Co.* (2), where he said: "There is also the further possible view that if the cargo is considered to have suffered alone through the damage by water, the cargo may nevertheless be not entitled to claim a contribution in general average because it was through its own inherent vice the real cause of the whole misfortune and sacrifice." But the judge a little further on points out that "It is material to bear in mind that the claim in this case is not one made by the owner of destroyed cargo against the shipowner, and resisted by the latter upon the ground either that the cargo was in fault or that there was no real sacrifice by reason of the cargo having been already inevitably lost, but a claim by a shipowner to be entitled as against the merchant whose goods had been saved to bring into the general average the freight alleged to have been sacrificed by an operation which saved the ship and a large part of the cargo and at the same time caused the total loss of the freight." So

(1) 4th ed. at p. 443. (2) 44 L. T. 426, at p. 429.

that the passage relied on is nothing more than a dictum and a statement of a possible opinion. When you come to look at the case of *Strang* v. *Scott* (1), and the enunciation there of the law by Lord Watson, it is clear that he considered the negligence of the party making the claim to be the important factor. He there says (2): "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save." And the decisions in the later cases of *The Carron Park* (3) and *Milburn* v. *Jamaica Fruit Co.* (4) seem to start with the assumption that negligence or wrong-doing must be shewn to disentitle the party claiming a general average contribution to recover. I therefore come to the conclusion in this case that, as the loss occurred without any negligence on the part of the owners of the coal, their claim to general average cannot be resisted merely upon the ground that it was the tendency of the coal to heat that caused the peril.

The remaining point taken by the plaintiffs turned upon the construction to be put on the language of the exception in rule 3 of the York-Antwerp Rules, which says that "no compensation shall be made for damage to such portions of the . . . . bulk cargo . . . . as have been on fire." Mr. Hamilton contended that where the bulk cargo was loaded in different holds the contents of each hold formed one portion for the purposes of the exception, and that as there had been fire in the coal in three of the holds, no compensation was to be made for the water damage to any of the coal in those three holds. I do not think that that

(1) 14 App. Cas. 601.
(2) Ibid. at p. 608.
(3) (1890) 15 P. D. 203.
(4) [1900] 2 Q. B. 540.

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is the meaning of the word "portions." As was pointed out by Buckley L.J. in the course of the argument, the word could not possibly be used in that sense when applied to the ship, for if it were the shipowner could never claim contribution if any part of the ship had been on fire; nor could it be claimed by a cargo owner if the bulk cargo were carried, as is sometimes the case, in a ship not divided by bulkheads into several holds. In my opinion the words "such portions . . . . as have been on fire" mean simply so much as has been actually ignited. The appeal must be dismissed.

BUCKLEY L.J. I am of the same opinion.

KENNEDY L.J. I have come to the same conclusion. I agree with my Lord that the incorporation of the York-Antwerp Rules in the bills of lading does not exclude the consideration of the question which Mr. Hamilton and Mr. Hill have argued. I also agree, with regard to the point taken upon the construction of rule 3 of those rules, that it is impossible to read the words "such portions of the . . . . bulk cargo . . . . as have been on fire" as intended to apply to all the coal which may be in this or that hold. Passing from that, I may say that I do not quite follow the reasoning in Channell J.'s judgment in the Court below where he expresses himself as unable to see on what ground it could be said that that portion of the coal which had never been on fire caused the peril to the whole adventure. That objection does not seem to meet the contention of the appellants, which was that the owners of the coal that was damaged were not entitled to compensation in respect of that damage because they were also the owners of other coal the inherent vice of which caused the mischief. They suggested that the fact that the cargo was on fire in parts from spontaneous combustion was a reason for depriving the owners of compensation for any part of that cargo. I think it is settled by the decisions in this country that, as Brett L.J. said in *The Ettrick* (1), "if the general average contribution which" a person "claims is a general average contribution which arose

(1) 6 P. D. 127, at p. 135.

by reason of a default of his he cannot claim anything." And Cotton L.J. in the same case said (1): "It would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else." So that if here the fire arose from the cargo owners' "default" or "wrongful act" in shipping the coal as they did, Channell J.'s objection would afford no answer to the shipowners' contention that the cargo owners could not recover contribution in respect of the part of the coal which had not been on fire. But the question is, What is meant by the expressions "by reason of a default of his" and "wrongful act"? It seems to me that what is there meant is that the default must be something which is wrongful in the eye of the law, that is to say, something which constitutes an actionable wrong. That appears to be the just inference from *The Carron Park* (2) and *Milburn* v. *Jamaica Fruit Co.* (3) In *Strang* v. *Scott* (4) Lord Watson, speaking of the exceptions to the Rhodian law of contribution, says: "Such exceptions as that recognized in *Schloss* v. *Heriot* (5) are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrong-doers, or of those who are legally responsible for them." Sitting here, I think we are bound by authority. If the case goes further, no doubt the question may be considered. It appears that the Supreme Court of the United States have taken a different view from that which our Courts have adopted in *The Irrawaddy* (6), where they held that the fact that a shipowner was relieved by the provisions of the Harter Act from legal liability for errors in navigation of the ship did not entitle him to the benefits of a general average contribution to meet losses occasioned by negligent navigation. In the present case there was no actionable wrong. The Courts of this country have never laid it down that the mere fact that the mischief arose out of the goods shipped by the person claiming general average deprived him of his right so to claim. There is no absolute warranty by the shipper of safety of carriage in cases where the

(1) 6 P. D. 127, at p. 137.
(2) 15 P. D. 203.
(3) [1900] 2 Q. B. 540.
(4) 14 App. Cas. 601, at p. 609.
(5) 14 C. B. (N S.) 59.
(6) (1897) 171 U. S. 187.

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GREEN-SHIELDS, COWIE & CO. v. STEPHENS & SONS.

Kennedy L.J.

goods shipped may be openly seen and are known by the shipowner to be by their nature possibly productive of danger: see: *Brass* v. *Maitland* (1), and especially the judgment of Crompton J. It was contended by Mr. Hill that, even though there be no liability to action on the part of cargo owners in such a case as the present, yet it is on moral grounds unreasonable and unfair that they should be entitled to claim in general average. For myself I cannot see what there is unreasonable or unfair in their so doing. As between themselves and the shipowner they have merely shipped that which the shipowner knew he was taking on board with its liability to spontaneous combustion. So, too, with the other shippers—they either knew that the cargo other than their own was coal, or they did not choose to inquire, and in either case they took upon themselves the risk of damage arising from the coal's natural tendency to heat. The coal in this case was not exceptionally combustible, nor were the shippers guilty of any negligence in the shipping of it. Under those circumstances it seems to me that there is nothing unfair or unreasonable in the shippers of the coal retaining their rights in common with others to a general average contribution in respect of such of their goods (not having been actually on fire) as have been sacrificed for the safety of the general adventure.

Appeal dismissed.

Solicitors for appellants: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for respondents: *Thomas Cooper & Co.*

1 (1856) 6 E. & B. 470.

J. F. C.

[IN THE COURT OF APPEAL.]

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1907
Nov. 5, 6.

WRIGHT *v.* MARQUIS OF ZETLAND AND OTHERS.

School (Endowed)—Assistant Master—Scheme—Master and Servant—Wrongful Dismissal—Notice of Dismissal—Power to dismiss "at pleasure"—Action against Governors—Endowed Schools Act, 1869 (32 *&* 33 *Vict. c.* 56), *s.* 22.

A scheme made under the Endowed Schools Act, 1869, with regard to an endowed school, provided that the foundation should be administered by a body of governors, who should appoint the head master of the school, and that the head master should have the sole power of appointing, and might "at pleasure" dismiss, all assistant masters in the school. In an action for wrongful dismissal by a plaintiff who had been an assistant master in the school against the governors in respect of his dismissal by the head master without notice, the jury found that a custom existed entitling assistant masters in endowed schools to a term's notice of dismissal:—

Held (affirming the judgment of Lawrance J.), that such a custom as above mentioned was excluded by the terms of the scheme, and therefore the plaintiff was not entitled to notice of dismissal, and that in any case the action was not maintainable against the governors.

APPLICATION for judgment or a new trial in an action tried before Lawrance J. and a jury.

The action was brought by the plaintiff, who had been an assistant master at Richmond Grammar School, in Yorkshire, against the governing body of the school, to recover damages for wrongful dismissal from his position as such assistant master without notice.

The before-mentioned school was an endowed school within the meaning of the Endowed Schools Acts, 1868 and 1869, and was the subject of a scheme made by the Charity Commissioners under the provisions of the Endowed Schools Act, 1869, which was approved by the Queen in Council on May 9, 1892.

The following were the material provisions of the scheme:—Clause 1 provided that certain foundations and emoluments should thenceforth be one foundation, and should be administered under the scheme, under the name of Richmond Grammar School, thereinafter called the "foundation." Clause 3 provided

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that, subject as in the scheme provided, the foundation should be administered by a governing body, thereinafter called the "governors." Clauses 4 and 5 provided for the constitution of the governing body.

Clause 20 of the scheme was as follows: "The property of the foundation not occupied for the purposes thereof shall be let or otherwise managed by the governors or by their agents acting under their orders according to the general law applicable to the management of property by trustees of charitable foundations. All payments for rates, taxes, repairs, and insurance of, or in respect of, any such property occupied for the purposes of the foundation shall, so far as not otherwise provided for, be made out of the income of the foundation." Clause 29 provided that the head master of the school should be a graduate of some university in the United Kingdom, and that every head master thereafter to be appointed should be appointed by the governors at a special meeting to be held as soon as conveniently might be after a vacancy, or after notice of an intended vacancy. Clause 30 was as follows: "The governors may at pleasure dismiss the head master, without assigning cause, after six calendar months' written notice given to him, in pursuance of a resolution passed at two special meetings, held at an interval of not less than fourteen days, such resolution being affirmed at each meeting by not less than two-thirds of the governors present and voting on the question." By clause 31 it was provided that the governors for what in their opinion was urgent cause might, by a resolution passed at a special meeting, and affirmed by not less than two-thirds of the whole number of governors for the time being, declare that the head master ought to be dismissed from his office as in this clause provided, and in that case they might appoint a second special meeting at which they could absolutely and finally dismiss him; and that full notice and opportunity of defence at both meetings must be given to the head master. By clause 37, within the limits fixed by the scheme, the governors were to prescribe the general subjects of instruction, the relative prominence and value to be given to each group of subjects, the arrangements respecting the school terms, vacations and holidays, the payments of day scholars and the number and payments of

boarders, and were to take general supervision of the sanitary condition of the school buildings and arrangements. They were also to fix the number of assistant masters to be employed, and were in every year to fix the amount which they thought proper to be paid out of the income of the foundation for the purpose of maintaining assistant masters and providing and maintaining a proper school plant or apparatus. Clause 40 was as follows: "The head master shall have the sole power of appointing, and may at pleasure dismiss, all assistant masters in the school, and shall determine, subject to the approval of the governors, in what proportions the sum fixed by the governors for the maintenance of assistant masters and school plant and apparatus shall be divided among the various persons and objects for which it is fixed in the aggregate. The governors shall pay the same accordingly either through the hands of the head master or directly as they think best."

The plaintiff had been appointed an assistant master at the school in 1903 by the then head master. In September, 1906, a new head master was appointed, who informed the plaintiff that he intended at the commencement of the ensuing term on September 21 to begin work at the school with an entirely new staff.

Evidence was given at the trial of a universal custom by which assistant masters at public and endowed schools were entitled to a term's notice of dismissal. The jury found that there was such a custom, and assessed the damages at 63*l.* 13*s.* 4*d.* The learned judge, however, held that there was no contract as between the plaintiff and the defendants, and that the defendants were not responsible for the dismissal of the plaintiff by the head master. He therefore gave judgment for the defendants. (1)

(1) Sects. 9 and 10 of the Endowed Schools Act, 1869, provide for the making of schemes with regard to educational endowments by the Commissioners under the Act, and that by such schemes the constitution, rights, and powers of any governing body of an educational endowment may be altered. By s. 22 of the Act, "In every scheme the Commissioners shall provide for the dismissal at pleasure of every teacher and officer in the endowed school to which the scheme relates, including the principal teacher, with or without a power of appeal in such cases and under such circumstances as to the Commissioners may seem expedient."

By s. 45 of the Act, "a scheme

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Montague Lush, K.C., and *V. M. Coutts Trotter*, for the plaintiff. The words "at pleasure" in s. 22 of the Endowed Schools Act, 1869, and in clause 40 of the scheme, are not in any way inconsistent with the existence of a contractual obligation implied by custom, as found by the jury, to give a term's notice of the intention to terminate the engagement of an assistant master. Before the Endowed Schools Acts the masters of endowed schools such as this generally had an office for life, provided they continued of good behaviour. The provisions of s. 22 were inserted with a view to putting an end to this state of things, to which there were serious objections, and preventing such masters in future having vested interests for life in their offices. The words "at pleasure" are merely equivalent to "without assigning any reason." Sect. 22 could not have meant that every scheme made under the Act must provide for the power of dismissing at a moment's notice all masters in endowed schools, with the correlative consequence that all the staff of masters in such a school might discharge themselves at a moment's notice, leaving the school work at a standstill. If that were the meaning, it would follow that clause 30 of the scheme, which provides for giving six months' notice of dismissal in the case of the head master, is ultra vires and in contravention of the Act. If that is not so, it follows that there is no inconsistency between the existence of a power to dismiss "at pleasure" and an obligation to give a reasonable notice of dismissal, which is fixed by the custom at a term's notice. Those who framed the scheme may have thought that, in the case of the head master, it was reasonable that there should be a six months' notice, leaving the period of notice in the case of the assistant masters to be determined by express stipulation or by custom.

[SIR GORELL BARNES, PRESIDENT. Clause 31 of the scheme gives to the governors a special power to dismiss the head master for an

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shall not of itself have any operation, but the same, when and as approved by Her Majesty in Council, shall from the date specified in the scheme, or, if no date is specified, from the date of the Order in Council, have full operation and effect in the same manner as if it had been enacted in this Act."

urgent reason. No such special power is given in the case of an assistant master, though one would suppose that it might be as much requisite as in the case of a head master. May not the reason be that in the case of an assistant master the terms of clause 40 rendered such a power unnecessary?]

That power might be necessary in the case of a person occupying such an important position in the school as the head master, but not in the case of an assistant master. The case of any gross misconduct by an assistant master would probably constitute an exception from the custom with regard to notice.

[The following cases were referred to in reference to the above-mentioned point: *Willis* v. *Childe* (1); *Dummer* v. *Corporation of Chippenham* (2); *Hayman* v. *Governors of Rugby School* (3); *Reg.* v. *Governors of Darlington School* (4); *Reg.* v. *Fox* (5); *Reg.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (6)]

The correct view of the facts and the provisions of the scheme is that the assistant masters are employed by the governors, the head master being constituted their agent to appoint and to dismiss them. That being so, the action was rightly brought against the governors.

[SIR GORELL BARNES, PRESIDENT. It seems difficult to say that the governors, who have no power to dismiss an assistant master, are the parties responsible for wrongfully dismissing him.]

It seems more difficult to suppose that the assistant master contracts with the head master, who may be a person of no means. If the head master were to be considered as the employer, then, if the funds of the school were insufficient, he would be liable for the salaries of the assistant masters. This can never have been intended. Unless there is a contract with some one for the employment of the assistant master, what remedy would he have for non-payment of his salary? It would be a very cumbrous remedy that he should have to bring an action in the Chancery Division to enforce the trusts of the scheme. The governors fix the number of the assistant masters, and the aggregate amount payable to them. It cannot be that the head master, who has no

(1) (1850) 13 Beav. 117.
(2) (1807) 14 Ves. 245.
(3) (1874) L. R. 18 Eq. 28.
(4) (1844) 6 Q. B. 682.
(5) (1858) 8 E. & B. 939.
(6) (1854) 4 E. & B. 88.

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voice in these matters, is to be treated as employing the assistant masters. [They cited on this point *Holme* v. *Guy* (1); *Crocker* v. *Corporation of Plymouth.* (2)]

C. A. Russell, K.C., and *H. S. Cautley*, for the defendants, were not called upon to argue.

VAUGHAN WILLIAMS L.J. The questions raised in this case depend upon the terms of the scheme for the Richmond Grammar School, which was approved by Her Majesty in Council on May 9, 1892. I propose to refer to some of the clauses of that scheme, not for the purpose of commenting on them, but as sufficiently expressing the view of those who framed the scheme which was subsequently so approved. Clause 1 provides that "these foundations and endowments shall henceforth be one foundation, and shall be administered under this scheme, under the name of Richmond Grammar School, hereinafter called the foundation." Clause 3 provides that, "subject as herein provided, the foundation shall be administered by a governing body, hereinafter called the governors, consisting of twelve competent persons duly qualified to discharge the duties of the office, eight to be called representative governors, and four to be called co-optative governors." Clause 4 provides who the representative governors are to be—namely, three to be appointed by the county council of the North Riding of Yorkshire, four by the town council of Richmond, and one by the governing body of the University of Durham. Clause 5 provides that the first co-optative governors, instead of being four, shall be seven, of whom the Marquis of Zetland is one, and shall hold office for life, and the co-optative governors thereafter to be appointed are to hold office for eight years, and are to be appointed by the general body of governors at a special meeting. Clause 17 deals with business arrangements, such as finance and the appointment and remuneration of a clerk. Clauses 18 to 27 deal with the vesting of property, temporary school arrangements, and other matters. Clauses 28 to 56 are headed "The School," and amongst those clauses comes clause 30, which was frequently referred to in argument, though it is not the clause upon which the question

(1) (1877) 5 Ch. D. 901, at p. 910. (2) [1906] 1 K. B. 494.

before us turns. Clause 30 is as follows: "The governors may at pleasure dismiss the head master without assigning cause, after six calendar months' written notice given to him in pursuance of a resolution passed at two special meetings held at an interval of not less than fourteen days, such resolution being affirmed at each meeting by not less than two-thirds of the governors present and voting on the question."

It seems to me that the provision that dismissal at pleasure shall be carried out or expressed by a resolution passed at two special meetings is not inconsistent with dismissal at "pleasure," any more than if it was said that the dismissal must be in writing or under seal. It is a mere mode of the expression of the pleasure or will of the governors without assigning cause that the head master shall be dismissed. But I do not think that the fact that clause 30 provides that the resolution is to be passed at two special meetings held at an interval of not less than fourteen days prevents the dismissal being at "pleasure" or "at will" in the widest sense of those words respectively, although the pleasure or will by the very terms of clause 30 cannot take effect until after the lapse of at least fourteen days. The governors can not the less dismiss "at pleasure" because their pleasure has to be expressed by steps involving a lapse of time. This seems to me to get over all difficulties based on the suggestion that the words "at pleasure" in clause 30 of the scheme are inconsistent with the words of s. 22 of the Endowed Schools Act, 1869, which enacts that the scheme "shall provide for the dismissal at pleasure of every teacher and officer in the endowed school to which the scheme relates, including the principal teacher." Nothing in this section seems to me to prevent the scheme expressing the mode or conditions of the expression of the will of those dismissing a head master. Indeed, the last words of this section, "with or without a power of appeal in such cases and under such circumstances as to the Commissioners may seem expedient," seem to constitute a justification or authority for a provision in the scheme as to the mode of expression of the pleasure or will that a master should be dismissed, and in clause 40, the clause applicable in the present case and governing our decision, would have validated the introduction, after the word "may" in that

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clause, of the words "subject to an appeal to the governors or otherwise as hereinafter provided."

I will now deal with the construction of clause 40. The words "at pleasure" in that clause, it seems to me, must bear their ordinary meaning—that is, the wide meaning which I have already expressed. But it will be observed that clause 40, unlike clause 30, contains no provision as to the mode or conditions of expression of the will of the head master when dismissing an assistant master, and there is clearly no provision that the head master, in expressing his will or pleasure, shall include as a step in the expression of that will a six months' notice of his intention to dismiss. It is suggested that this step, although not provided for by the clause, yet applies by virtue of a custom. I am of opinion that custom is excluded by the specific provisions of the scheme as to (inter alia) the dismissal of an assistant master.

This really disposes of the whole case; but a further point was argued before us on behalf of the defendants, which was the point on which Lawrance J. decided the case—namely, that, assuming the plaintiff to have a good cause of action for wrongful dismissal, the governors were not the right persons to be sued. I agree with that view. I may add that I have grave doubts whether in this case there was any contract at all for the employment of the assistant master.

I wish also to add, with regard to the effect of the words "at pleasure," that, giving those words the widest possible meaning, I think that the pleasure must be exercised in good faith. Therefore, if the dismissal of a master be what I may, for the sake of brevity, call a corrupt dismissal, I think the Court might set it aside. There is, however, no suggestion of that sort here. I further think that there may be cases in which, the governors or the head master, as the case may be, having thought fit to assign a cause for the dismissal of a master, although under no obligation to do so, and that cause, when brought before the Court, appearing to be an insufficient cause, the Court may, as in a case where the dismissal is corrupt, set aside the dismissal. I mention these matters in order to prevent misunderstanding as to the effect of our judgment, but there is no question of anything of

the kind in the present case. For these reasons I think the application must be dismissed.

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SIR GORELL BARNES, PRESIDENT, and BIGHAM J. concurred.

Application dismissed.

Solicitors for plaintiff: *Reynolds & Son.*

Solicitors for defendants: *Oldman, Clabburn, Cornwall & Co., for C. G. Croft, Richmond, Yorks.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Nov.* 11.

MANSFIELD AND OTHERS *v.* RELF.

Landlord and Tenant—Lease—Covenant by Lessor to pay Land Tax—Construction—Value of Land improved by building.

Where in a lease of premises at a ground rent the lessors covenanted to pay the land tax chargeable on the demised premises:—

Held, that the covenant must be construed as referring only to so much of the total land tax chargeable on the premises as was proportionate to the benefit derived therefrom by the lessors, i.e., the amount of the ground rent.

Watson v. *Home*, (1827) 7 B. & C. 285, and *Smith* v. *Humble*, (1854) 15 C. B. 321, followed.

APPEAL from the judgment of Lord Alverstone C.J. in an action tried by him without a jury.

The action was brought by the plaintiffs, who were the trustees of certain charity land, as lessors, against the defendant, as assignee of a lease, to recover the sum of 1*l.* 5*s.* 6*d.*, as being the balance of one year's ground rent of the demised premises due at Michaelmas, 1905, after giving the defendant credit for 1*s.* 4*d.* for landlord's property tax and 2*d.* for land tax on the premises.

The defendant in his defence alleged that he was entitled to deduct from the rent 5*s.* 4*d.* in respect of land tax instead of 2*d.*, and brought into Court the sum of 1*l.* 0*s.* 4*d.* in satisfaction of the plaintiffs' claim.

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On November 8, 1890, the trustees, for the purpose of developing the before-mentioned charity land as a building estate, entered into an agreement with George Field Morris and William Henry Protheroe, by which it was in effect agreed that the latter should lay out the land as a building estate, and cause dwelling-houses to be built thereon, in the manner described in the agreement, and that the trustees should, as and when such dwelling-houses were erected, grant leases of them to the said G. F. Morris and W. H. Protheroe, or their nominee or nominees, for such terms, at such rents and upon such conditions as provided for by the agreement. It was further provided by the agreement that in the leases to be granted as before mentioned the lessors should covenant to pay the amounts chargeable in respect of rent-charge payable to the lord of the manor of Ruckholts on the enfranchisement of the copyhold tenure of the said land, and also the land tax and tithe rent-charge upon the land to be demised.

A lease of a dwelling-house erected in pursuance of the above agreement for a term of ninety-nine years was subsequently granted by the trustees to one Mathieson, a builder. By this lease, which was dated December 25, 1897, after reciting that the lessors had agreed with G. F. Morris and W. H. Protheroe to grant to them, or their nominee or nominees, a lease for the term of ninety-nine years of the hereditaments and premises thereby demised at a ground rent of 1*l.* 7*s.* per annum, and that the lessee had requested G. F. Morris and W. H. Protheroe to nominate him to the lessors in respect of such lease as aforesaid, which they had agreed to do in consideration of his securing to W. H. Protheroe in manner thereinafter appearing an additional or improved rent of 3*l.* 18*s.* per annum, it was witnessed that the lessors demised to the lessee the premises therein described to hold the same for the term of ninety-nine years from December 25, 1890, yielding and paying therefor, yearly and every year during the term, as from September 14, 1897, the yearly rent of 1*l.* 7*s.* (thereinafter referred to as the "ground rent") by equal quarterly payments on the usual quarter days in every year, clear of all deductions whatsoever, except rent-charge payable to the lord of the manor of Ruckholts on the enfranchisement

of the copyhold tenure of the lands of which the premises thereby demised formed part, land tax, tithe rent-charge, and landlord's property tax, the first quarterly payment of the said ground rent to be made on the 25th day of December, 1897. Then followed a grant by the lessee to W. H. Protheroe of an annual rent-charge of 3*l.* 18*s.* upon the demised premises during the term. The lease contained a covenant by the lessee with the lessors, and also as a separate covenant with W. H. Protheroe, (among other things) that the lessee would pay the ground rent of 1*l.* 7*s.* without any deductions whatsoever, except as aforesaid, and would pay and discharge during the term all rates, taxes, assessments, duties, charges, outgoings, and impositions whatsoever affecting, or which might at any time thereafter during the term thereby granted affect, or be payable out of, or for, or by the demised premises, or the lessors or tenant in respect or on account thereof, by authority of Parliament or otherwise, except as aforesaid. The lessors covenanted with the lessee (among other things) that they would during the demise pay the rent-charge payable to the lord of the manor as aforesaid, and also the land tax, tithe rent-charge, and landlord's property tax respectively chargeable upon the premises, and keep the lessee indemnified therefrom. The above-mentioned lease was afterwards purchased by and assigned to the defendant. The land tax chargeable upon the land included in the lease as improved by the erection of the house was 5*s.* 4*d.*, the proportion thereof chargeable on the amount of the ground rent being 2*d.* The defendant claimed to deduct from the year's rent in respect of which the action was brought the full amount of the land tax, but the plaintiffs contended that he was only entitled to deduct such proportion of the land tax as was chargeable in respect of the amount of the ground rent.

The Lord Chief Justice gave judgment for the plaintiffs for the amount claimed.

The *Defendant* in person. This case is distinguishable from the cases of *Watson* v. *Home* (1) and *Smith* v. *Humble* (2), upon the authority of which the Lord Chief Justice based his judgment

(1) 7 B. & C. 285. (2) 15 C. B. 321.

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in the Court below. In *Watson* v. *Home* (1) the houses were built subsequently to the granting of the lease. Therefore it was reasonable to construe the lessor's covenant to pay land tax as only applying to the land tax chargeable on the unimproved value of the land. Here the house was already built when the lease was granted; and, upon the terms of the covenant, the land tax to which it relates must be the land tax on the value of the land in its then existing state. In *Smith* v. *Humble* (2) there does not appear to have been any covenant by the lessor to pay land tax. The plaintiffs' contention really gives no effect to the lessors' covenant to pay land tax.

Ryde, for the plaintiffs. A series of authorities, of which *Watson* v. *Home* (1) and *Smith* v. *Humble* (2) are the last, has established the proposition that, in such a case as this, covenants by a lessor to pay land tax are to be construed as only applying to such proportion of the land tax as is attributable to the lessor's interest in the land. It is submitted that, though the Court of Appeal may not technically be bound by those authorities, nevertheless it would not, having regard to the length of time during which they have stood unquestioned, and the number of leases which have probably been framed on the strength of them, at the present day depart from the law so laid down. The suggested distinction between this case and *Watson* v. *Home* (1) by reason of the fact that in this case the house was already built when the lease was executed is really untenable. The very same point was raised by the defendant's counsel in *Smith* v. *Humble* (2) and overruled by Jervis C.J. in the course of the argument. The lessors in this case only receive a ground rent based upon the unimproved value of the land, the benefit of the improvement going to those who erected the house. The result of construing the covenant as suggested by the defendant would be that, where the value of land has largely increased through improvements made thereon in respect of which the lessor derives no rent, the lessor may have to pay in respect of land tax more than he receives by way of rent. [He also cited the Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 17, 35.]

The *Defendant* in reply.

(1) 7 B. & C. 285 (2) 15 C. B. 321.

VAUGHAN WILLIAMS L.J. I think it very natural that the defendant, not being a lawyer, should understand a lease in these terms as meaning that the lessors had covenanted that they would pay the whole of the land tax chargeable upon the demised premises; but there has been a series of cases, extending from a period long antecedent to the decision in *Watson* v. *Home* (1) in the year 1827 down to modern times, in which it has been decided that, in construing covenants contained in leases by which the landlord covenants to pay the land tax, or by which the tenant covenants to pay all rates and taxes with the exception of land tax, the covenant must be treated as referring only to that proportion of the land tax which is properly payable by the landlord. That being so, I do not think that we can at this time of day alter the doctrine of law on that subject which has so long prevailed. It would be a great hardship upon many persons, who have granted leases on the basis of the decisions given in those cases being good law, that we should, after such a lapse of time, throw upon them obligations which, according to those decisions, would not be imposed upon them by the leases which they have executed. Even if, apart from authority, one would have been disposed to arrive at a different conclusion from that arrived at in the cases to which I have alluded—which I am far from saying—it is in the interests of the community that the view of the law established by those cases for so long a period should not now be altered.

Having said thus much, I propose to refer briefly to the two cases upon which the counsel for the plaintiffs relied. The first of these cases is *Watson* v. *Home*.(1) The marginal note, which states the nature of the case with sufficient particularity for general purposes, is as follows: "By lease, lessor demised for a term of years a piece of ground at a fixed annual rent. The tenant covenanted not to build on the land without the licence of the lessor. The lessor covenanted to pay all taxes already charged, or to be charged, upon or in respect of the demised piece of ground, during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the

(1) 7 B. & C. 285.

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lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: Held that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value." In that case, as pointed out by the defendant, the improvement took place, and the value of the land demised was thereby increased, after the granting of the lease. It is, perhaps, desirable to refer to the exact words of the covenant on which the action was brought in that case, because, from the marginal note as framed, it might be supposed that the covenant contained no express mention of land tax; but, when one looks at the terms of the covenant as set forth in the body of the report, one finds that it runs thus: "And also that he, the said W. Home, his executors &c., shall and will bear, pay, and discharge, as well the land tax as all other taxes, charges, rates, assessments, and impositions, parliamentary, parochial or otherwise, already charged, or to be charged, upon or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the said term hereby granted, or any renewed term or terms to be granted, or upon the said L. Prendergast, his executors, administrators, or assigns in respect thereof." Therefore the covenant was an exceedingly strong one for the present purpose; first, because it specially mentioned the land tax; and, secondly, because it dealt, not only with the taxes, as then assessed upon the premises, but also with those which might be assessed upon them thereafter during the continuance of the term. Nevertheless, when Holroyd J., from whose judgment I propose to cite a passage, came to deal with the matter, agreeing as he did with his brother Bayley J. that the case turned upon the construction of the words of the covenant, which was similar to that in the present case, he construed the covenant so as to limit the liability of the lessor under it to an amount proportionate to the benefit which he derived from the land. He said: "The assessments ought to be made on the land in proportion to its annual value. If these taxes, therefore, had been payable in the first instance, partly by the landlord and partly by the tenant, each of them must have been assessed in proportion to that annual value which the land produced to him; but by

law these taxes are payable by the tenant. It seems to me that the effect of the covenant in this case is to make the landlord and tenant contribute respectively to the taxes in proportion to the benefit which they receive from the land. The defendant in terms covenanted to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term. The parties by the reddendum agreed that the annual value of that piece or parcel of ground should, during the continuance of the term, be of the annual value of 79*l.* 12*s.* 6*d.* The covenant to pay taxes must, therefore, be construed with reference to that value. By this construction each party will contribute to the taxes in proportion to the benefit which he receives from the land. The lessor will pay taxes upon the original value, and the tenant upon the improved value, of which he alone reaps the whole benefit. I think, therefore, that the landlord must pay that proportion of the taxes which would have been payable by the tenant if the premises had remained in their original state, and of the annual value of 79*l.*" It appears to me to be impossible for us to depart from the proposition of law thus laid down so many years ago, and followed ever since, namely, that a covenant of the kind now in question ought to be construed in the manner pointed out by Holroyd J.

It was sought to distinguish that case from the present on the following ground. It was said that, although the construction of the covenant there adopted might be the right construction of such a covenant in a case where the value of the land had been increased by improvements made subsequently to the lease, it ought not to be so construed where, as in the present case, no improvement had taken place subsequently to the lease. That point was specifically raised in the case of *Smith* v. *Humble* (1) and dealt with by Jervis C.J. in his observations during the argument. In that case the marginal note states that A. demised land to B. upon a building lease at the yearly rent of 60*l.* clear of all rates, assessments, &c., the sewers rate, land tax, and landlord's property or income tax only excepted, with the usual covenants for the payment of rent, &c., and, B. having by

(1) 15 C. B. 321.

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building on the land increased its rateable value to 300*l.* per annum, it was held that he was only entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value. The plaintiff's counsel having cited in argument a series of authorities ending with *Watson* v. *Home* (1) as supporting the plaintiff's contention, the defendant's counsel at the commencement of his argument said: "The defendant is entitled to deduct the land tax and sewers rate upon the premises demised as they stood at the date of the lease. The present case is distinguishable from all those cited, in this, that the premises here were of their present value at the time the lease was granted." To that Jervis C.J. replied: "The tenant builds on the land, and, in consideration of his outlay, he gets for 60*l.* a year premises worth 300*l.* a year." Then, again, later on in the argument the Chief Justice says: "This is substantially a case of improved value."

It appears to me that the same considerations apply here, and that these authorities really dispose of every point with which we have to deal in this case. It is clear that under the Land Tax Act, irrespective of any covenant on the subject, the incidence of land tax on the persons interested in land is intended to be proportionate to the benefit which they respectively derive from the land, whether in the shape of rent or occupation. Here the benefit which the lessors derive from the demised premises is 1*l.* 7*s.* yearly, and the remaining benefit is derived by the defendant as occupier. Under these circumstances it seems to me that, unless we are prepared to overrule the cases to which I have alluded, we can only come to the conclusion that the judgment of the Lord Chief Justice is correct, and this appeal must be dismissed.

One point was referred to during the argument, which, I must admit, appeared to me to be a strong one, although the same thing might have been said in the cases of *Watson* v. *Home* (1) and *Smith* v. *Humble*. (2) That point was that the construction thus put on the covenant by the lessor to pay land tax merely has the effect of leaving things exactly as they would have stood without any covenant under the Land Tax Act, and therefore

(1) 7 B. & C. 285. (2) 15 C. B. 321.

really gives no effect to the covenant. I agree that, if that be so, prima facie it would appear to be a reason for not so construing the covenant. One often hears it urged as a reason for not construing words in a contract or a statute in a particular manner that to do so would be in substance to give them no effect at all; and in many cases, no doubt, that argument for not giving a particular construction to words is a sound one, and ought to prevail. But, admitting that there might have been much force in this argument, if the question now in dispute were res integra, and had not been the subject of decisions going back as far as the eighteenth century, I do not think we can now go back upon those decisions and alter the law as laid down by them.

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SIR GORELL BARNES, PRESIDENT, and BIGHAM J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Sayle, Carter & Co., for S. R. Andrews, Bourn.*

Solicitors for defendant: *Hird & Thatcher.*

E. L.

[IN THE COURT OF APPEAL.]

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LENEY & SONS, LIMITED *v.* CALLINGHAM AND THOMPSON.

Practice—Receiver—Public-house — Licences in Jeopardy — Landlord and Tenant—Recovery of Possession—Receiver of Licences and of Rents and Profits—Preservation of Subject-matter of Litigation—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of the Supreme Court*, 1883, *Order* L., *rr.* 3, 16—*Form of Order.*

The owner of licensed premises has sufficient prima facie interest in the business to entitle him to the appointment of a receiver of the licence to secure its preservation pending litigation.

In an action by a lessor to recover possession of an hotel, where the lessee had covenanted to keep the hotel continuously open and not to do anything whereby the licence might be endangered, the Court appointed a receiver of the licence and of the rents and profits, ordered the licence to be delivered up to the receiver, and authorized him to keep the house continuously open as an hotel, and to do all such acts as

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might be necessary for that purpose, and for the purpose of preserving the licence from forfeiture.

Form of order in *Charrington & Co., Ld.* v. *Camp*, [1902] 1 Ch. 386, discussed and modified.

THIS was an appeal from an order of Pickford J. in chambers, which raised the question whether the lessor of a public-house, who had taken proceedings to recover possession of the property by an ejectment action, was entitled to obtain the appointment of a receiver of the licences, as well as of the premises. The facts were shortly as follows:—

The plaintiffs, who were brewers, by a lease of July 27, 1900, demised the Carlton Hotel, Tunbridge Wells, to the defendant Callingham for a term of twenty-one years on a repairing lease at a rent of 265*l.* per annum. The lease contained the usual covenants by the lessee for himself, his executors, administrators and assigns, for payment of rent and for repair, and also that the lessee would "throughout the said term keep the premises continuously open as an hotel, and will use his best endeavours to preserve and extend the trade and connection thereof." There was also a covenant that the lessee would "conduct and manage the said hotel in a proper, orderly, and respectable manner, and will not do or suffer anything to be done whereby the licence of the said hotel may be endangered, indorsed, forfeited, taken away, suspended, or refused, but will at all proper times during the said term apply for and endeavour to procure a renewal of the necessary licences for using and keeping the said messuage open as and for an hotel and at the determination of the said term will do all necessary acts for assigning and transferring the then existing licences and all magistrates' certificates to the person or persons entitled thereto on being paid the fair proportion of the unexpired term thereof."

The defendant Thompson subsequently became the tenant of this hotel on the terms of this lease, and as his rent was in arrear, and he had also recently shut up the hotel for short periods and ceased to carry on the business regularly, the plaintiffs commenced the present action for recovery of possession.

On October 14 a summons was taken out in this action for the

appointment of a receiver of the hotel, and by an order of October 23, 1907, a receiver was appointed by Pickford J. of the rent and profits of the Carlton Hotel, and the defendant was ordered to deliver up to such receiver "all the books, papers, and licences relating thereto, and also possession of the premises so far as is necessary for the purposes of such receiver"; and it was further ordered that "the said receiver be at liberty to appoint some fit and proper person to reside upon the said premises and to hold the said licences and conduct the business under his supervision."

From this order the defendant Thompson appealed. The appeal was heard on November 2 and 5.

McCardie, for the appellant. There was no jurisdiction to appoint a manager of this hotel, which is in effect what this order does, or to direct the licence to be handed over to the receiver. The mere fact that the plaintiffs' house happens to be an hotel is no ground for appointing a receiver of the licence: *Whitley* v. *Challis*. (1) The jurisdiction in this case is given by the Judicature Act, 1873, s. 25, sub-s. 8, and the Rules of the Supreme Court Order L., but that jurisdiction is confined to the subject-matter of dispute, in this case the house only; the licence is in the defendant's name and belongs to him, and in any case the appointment of a receiver in an ejectment action is discretionary: *Foxwell* v. *Van Grutten* (2); and the discretion must be exercised with a view to all the circumstances of the case: *John* v. *John* (3); *Gwatkin* v. *Bird*. (4) The case relied on by Pickford J. was *Charrington & Co., Ld.* v. *Camp* (5); but the judgment in that case does not go as far as the order said to have been drawn up as the result of that decision, the terms of which are said to be the same as the present order.

[COZENS-HARDY M.R. sent for the registrar's book, and, having examined the actual order as drawn up in *Charrington & Co., Ld.* v. *Camp* (5), stated that the order now under appeal was in

(1) [1892] 1 Ch. 64.
(2) [1897] 1 Ch. 64.
(3) [1898] 2 Ch. 573.
(4) (1882) 52 L. J. (Q.B.) 263.
(5) [1902] 1 Ch. 386.

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exactly the same words as the order in *Charrington & Co., Ld.* v. *Camp.* (1)]

The order goes too far in directing "all books and documents" to be handed over and in appointing some one "to conduct the business." An order in this form may be proper in the case of a receiver of mortgaged premises, where the business is included in the security, but it is not proper in a case like the present where the business does not belong to the plaintiffs. This form of order was not approved of, though followed, in *Whitbread & Co.* v. *Grain.*(2) This form of order is said to have been followed by Swinfen Eady J. in *City of London Brewery* v. *Bateson* (3), but this is wrong, as the Court has no jurisdiction to appoint a receiver and manager of a business which does not belong to the landlord.

Hon. M. Macnaghten, for the respondents, having admitted that he could not support the order for delivery over of "books and papers" or the appointment of some one "to conduct the business," was stopped.

COZENS-HARDY M.R. This appeal raises a question of interest, and undoubtedly of importance to a large section of the community. It is a case in which the plaintiffs are the landlords and the defendant is the lessee. The lease is a lease of an hotel at Tunbridge Wells, which contains covenants in the fullest possible form. The premises are described as an hotel, and the plaintiffs are themselves brewers. The lease contains covenants by the tenant not only to pay the rent, but also to keep the premises "continuously open as an hotel," and also to conduct it in an orderly manner so as not to endanger the licences. [The Master of the Rolls read the covenants, and continued:—] Then there is a proviso for re-entry in the fullest form on breach of covenant. It is admitted on the evidence, and on the defendant's own statements, that the defendant has not paid his rent, and that he has not kept the hotel open as a licensed house continuously; and I think it is only a fair reading of his evidence to say that he threatens and

(1) [1902] 1 Ch. 386.
(2) (1907) 23 Times L. R. 462
(3) *Brewers' Journal* for March 15, 1907.

intends to shut it up, because he practically says that he is not in a position to do that which is necessary to continue the hotel as a licensed house. Under these circumstances the landlords commenced an action to recover possession for breach of covenant and applied for the appointment of a receiver. Pickford J., contrary to his first impression, on his attention being called to the judgment of Joyce J. in *Charrington & Co., Ld.* v. *Camp* (1), did make the order which was asked for, and granted it in the terms of the order made in *Charrington & Co., Ld.* v. *Camp*. (1) I think that the order made by Joyce J., in so far as it gave effect to his intention as reported, was right. The learned judge evidently intended to do no more than make such an order as would preserve the licences pending the dispute; but the order, as drawn up, goes a great deal further than that. It appoints a receiver of the rents and profits of the hotel, and it orders that the defendant do deliver over to the receiver all the books, papers, and licences relating thereto, and also possession of the premises so far as necessary for the purpose of such receiver; and then he, the receiver, is to pay the balance into Court. Then it says: "And it is ordered that the said receiver be at liberty to appoint some fit and proper person to reside upon the said premises and to hold the said licences and conduct the business under his supervision."

A form of appointment of a receiver and manager so extensive as that is quite reasonable and proper in the very common case of a mortgage of a public-house where the mortgage expressly comprises the goodwill of the business; but here it seems to me—and Mr. Macnaghten has conceded the point—that it is not possible to justify the order in so far as it requires the defendant to deliver over all "books and papers," still less is it possible to justify it in so far as it authorizes the receiver to "conduct the business," which suggests or means the business the defendant is carrying on.

I think, although the order is in substance right, it ought to be modified by limiting it to doing so much as is necessary to preserve the premises as licensed premises; that the receiver should be entitled to possession of the licence itself, and the defendant be ordered to hand over the licence itself; and that the

(1) [1902] 1 Ch. 386.

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receiver should be at liberty to appoint a fit and proper person to reside on the premises, and to do all such acts and things as are necessary to prevent the licence from being forfeited or injured or endangered, to this extent following the judgment in *Charrington & Co., Ld.* v. *Camp* (1), and that the receiver should hold the licence.

With that modification I think the order is right, and I have the satisfaction of feeling that in this case I have given effect to what Kekewich J. in the case before him of *Whitbread & Co.* v. *Grain* (2) thought was substantially right. He agreed that the appointment of a receiver of a licence was quite right, but he hesitated to approve of the wider language of the order as drawn up in *Charrington & Co., Ld.* v. *Camp.* (1) I do not think that the form of order in that case as drawn up really gave effect to what Joyce J. intended to decide; but this order, as we now modify it, will, I think, give effect to his intention, and will preserve the matter pending the proceedings. I do not think that this modification ought to affect the costs in any way.

FLETCHER MOULTON L.J. I am of the same opinion. It appears to me that when licences are property which is the subject of a claim we are entitled and bound to do what is necessary to preserve them pending the action. I fully approve of the order sketched out by the Master of the Rolls.

FARWELL L.J. I agree. The preservation of property pending litigation is an old head of equity; and in former days bills quia timet to preserve property were of common occurrence. The mode of preservation, in cases in which preservation ought to be granted, was in the judicial discretion of the Court. The modes were various, and they are now, by reason of Order L., even more various; receivers may be appointed, injunctions granted, and directions given for money and property to come into Court, and sales of goods for the sake of preservation may be ordered. But the question of the exercise of the judicial discretion was always based, and is still based, upon this, that there is property in dispute to some interest in which the plaintiff shews a prima facie title; and preservation is ensured until the rights of the parties can be finally determined. It is

(1) [1902] 1 Ch. 386. (2) 23 Times L. R. 462.

shewn by *Whitley* v. *Challis* (1) that a mortgagee's security cannot be enlarged because he happens to have taken a mortgage on a house in which a business is carried on, whether that business be that of a licensed victualler or anything else. The only property to which, in such a case, the plaintiff shews a prima facie title is the house, and not the business; and the Court, therefore, does not interfere by the appointment of a receiver or manager of the business. But in a case like the present, when the lease is of an hotel, with covenants such as those read by the Master of the Rolls, the plaintiffs do shew a prima facie title to an interest, and a substantial interest, in the licences, which have no useful or practical existence apart from the business. To the extent, therefore, to which it is necessary to keep the business alive in order to preserve and effectuate the licences a manager must, in my opinion, be appointed to carry out that intention of the parties. This case in no way goes beyond the usual discretion exercised by the Courts to preserve the property when the plaintiff shews a prima facie title.

The order as drawn up was as follows:—

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Let so much of the order made by the Hon. Mr. Justice Pickford in chambers dated October 23, 1907, as directs the defendants to deliver over to the said [receiver] "all the books, papers and licences relating" to the said messuage known as the Carlton Hotel; and provides that the said [receiver] shall be "at liberty to appoint some fit and proper person to reside upon the said premises and to hold the said licences and conduct the business under his supervision" be discharged. And in lieu thereof let it be ordered that the defendants do deliver over to the said [receiver] all the licences and magistrates' certificates relating to the said messuage, and that the said [receiver] be at liberty until judgment or further order to keep the said messuage continuously open as an hotel, and to do all such acts and things as may be or become necessary for that purpose, and for the purpose of preserving the licences of the said hotel from indorsement, forfeiture, suspension or refusal, and from being endangered or taken away.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for F. Deeley, Dudley; Collyer-Bristow, Curtis, Booth, Birks & Langley, for Stone, Simpson & Mason, Tunbridge Wells.*

(1) [1892] 1 Ch. 64.

W. C. D.

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Oct. 29, 30.

CROSSLEY BROTHERS, LIMITED *v.* LEE.

Landlord and Tenant—Trade Fixture—Hiring Agreement—Gas Engine—Distress.

A gas engine was let out by the plaintiffs on hire under an agreement in writing which provided for monthly payments, and that the engine should remain the property of the plaintiffs until the hirer had exercised the option of purchase given by the agreement, and should be removable by the plaintiffs on the failure of the hirer to pay any instalment. The engine was affixed to the floor of premises, of which the hirer was the defendant's tenant, by bolts and screws, and was used by the hirer for the purposes of his trade. The engine was seized by the defendant under a distress for rent due from the hirer and sold:—

Held, that the engine had become a fixture, and was therefore not distrainable.

Hobson v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1903] 1 K. B. 87, followed.

Hellawell v. *Eastwood*, (1851) 6 Ex. 295, not followed.

Appeal of the plaintiffs from the Shoreditch County Court.

The action was brought to recover damages for the alleged wrongful seizure by the defendant of an Otto gas engine, the property of the plaintiffs. The engine had been supplied by the plaintiffs to one Jones, a tenant of the defendant, on the terms of a hire-purchase agreement, which provided that Jones should pay for the hire of the engine by certain specified payments, and that he might at any time purchase the engine for a specified sum, but that, until he did purchase it, the engine should remain the sole property of the plaintiffs, who were empowered if default were made in the payment of the hire, or for certain other causes, to retake possession of the engine.

The engine was used by Jones in his business of a printer, carried on by him at premises of which he was the defendant's tenant. Evidence was given that it was affixed to the floor of the basement in the following manner: An excavation was made in the concrete floor of the basement; the hole was filled with concrete grouting, in which four vertical bolts were inserted and cemented in so that they projected above the floor. The bolts were passed through holes in the base of the engine, and nuts were then screwed on to the bolts. The object of fixing the

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engine in this way was to keep it steady while being worked. Some time after the engine had been thus fixed in position Jones left the premises, and let the basement to one Fuller on a weekly tenancy and purported to sell the engine to him. The plaintiffs had no notice of this transaction. Subsequently, the engine still being in its original position, the defendant distrained for rent due in respect of Jones' tenancy. The engine was seized as part of the distress and removed from the premises and sold. It was in respect of this seizure that this action was brought.

The county court judge held that the engine was capable of being distrained upon; that the engine was fixed in the same way as the machine was fixed in *Hellawell* v. *Eastwood* (1); and on the authority of that case he gave judgment for the defendant.

The plaintiffs appealed.

J. A. Hamilton, K.C., and *Schwabe*, for the plaintiffs. The county court judge wrongly held that this gas engine was distrainable. It was affixed to the building in precisely the same manner as the gas engine in *Hobson* v. *Gorringe* (2) was affixed, and it was held in that case by the Court of Appeal that the engine was sufficiently annexed to the freehold to become a fixture. In *Reynolds* v. *Ashby* (3) the facts were also similar, and *Hobson* v. *Gorringe* (2) was there approved of and followed. The result of those and other authorities is that in the present case the engine had, after being fixed, ceased to be a chattel and had become a fixture. It may be that it is a fixture which the tenant would be entitled to remove at the end of his tenancy, but being a fixture it is clearly not distrainable. It is true that in *Hobson* v. *Gorringe* (2) and *Reynolds* v. *Ashby* (3) the question was whether the particular article passed under a mortgage, but if the engine is a fixture for one purpose (and it cannot be disputed that it would have passed to a mortgagee under a mortgage of the premises), it cannot remain a chattel for another purpose, namely, for the purpose of distress. The county court judge thought that he was bound by *Hellawell* v. *Eastwood* (1) to decide

(1) 6 Ex. 295. (2) [1897] 1 Ch. 182.
(3) [1903] 1 K. B. 87.

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in favour of the defendant. *Hellawell* v. *Eastwood* (1) cannot now be regarded as a binding authority. It has been adversely criticized in many cases, including those referred to above, and it is in conflict with the later case of *Climie* v. *Wood* (2), a decision of the Exchequer Chamber. It was not followed in *Turner* v. *Cameron* (3), which was a case of distress, and which is an authority directly in point in the plaintiffs' favour. The most that can be said for *Hellawell* v. *Eastwood* (1) is that the principle was correctly stated, but that it was wrongly applied to the facts of that case: *Holland* v. *Hodgson* (4) per Blackburn J. If that is the correct view of *Hellawell* v. *Eastwood* (1) it is fatal to the defendant's case, for the county court judge has found as a fact that the method by which the engine was affixed to the building is identical with that adopted in *Hellawell* v. *Eastwood*. (1)

[They also referred to *Leigh* v. *Taylor* (5); *Lyon* v. *London City and Midland Bank*. (6)

PHILLIMORE J. referred to *Poole's Case*. (7)]

T. Beven and *Abinger*, for the defendant. It is not disputed that on a mortgage of these premises the engine would have passed to the mortgagee, but it does not follow that for the purpose of a distress the engine has ceased to be a chattel and is not distrainable. In the case of a mortgage everything which is found to be attached to the mortgaged premises prima facie passes to the mortgagee, and no evidence as to the purpose for which the article was attached can displace the presumption of law that a thing which is annexed to the freehold forms part of the freehold; but when the question arises between landlord and tenant as to whether a particular article has ceased to be a chattel and has become a fixture, the presumption is that an article has not lost its character as a chattel until the contrary is shewn. The distinction between the two classes of cases is recognized by Kelly C.B. in *Climie* v. *Wood* (8) in the Court of Exchequer, and by Blackburn J. in *Holland* v. *Hodgson*. (4) The law as to what

(1) 6 Ex. 295.
(2) (1869) L. R. 4 Ex. 328.
(3) (1870) L. R. 5 Q. B. 306.
(4) (1872) L. R. 7 C. P. 328, at p. 337.
(5) [1902] A. C. 157.
(6) [1903] 2 K. B. 135.
(7) (1703) 1 Salk. 368.
(8) (1868) L. R. 3 Ex. 257.

constitutes a fixture as between landlord and tenant was laid down by Parke B. in *Hellawell* v. *Eastwood*. (1) That case has never been overruled; on the contrary, the decision has been followed ever since in cases between landlord and tenant, and has always been treated as authoritative by text-writers: see Smith's Leading Cases, 11th ed. vol. 1, pp. 442, 443; vol. 2, p. 205; Foà on Landlord and Tenant, 4th ed. p. 496; Addison on Torts, 8th ed. p. 325. *Hellawell* v. *Eastwood* (1) was followed in *Waterfall* v. *Penistone* (2) and *Chamberlayne* v. *Collins* (3), and was recognized as an authority in *Reg.* v. *Lee* (4), *Longbottom* v. *Berry* (5), *Walmsley* v. *Milne* (6), and *Mather* v. *Fraser*. (7) All the cases cited for the plaintiff are cases of mortgagor and mortgagee, with the exception of *Turner* v. *Cameron* (8), where the test laid down in *Hellawell* v. *Eastwood* (1) was approved of and applied to the facts of that case, and the decision therefore is in favour of the defendant, not of the plaintiffs. *Hellawell* v. *Eastwood* (1) was not referred to either in the argument or judgment in *Hobson* v. *Gorringe* (9), and the method of attachment of the engine in the latter case was not the same as in the present. Having regard to the way in which this engine was affixed to the premises, and to the fact that it had been hired by the tenant for the purpose of his business, the county court judge has rightly held that the engine never ceased to be a chattel, and was therefore distrainable. [*Gaslight and Coke Co.* v. *Hardy* (10) was also referred to.]

Schwabe replied.

PHILLIMORE J. In my opinion this appeal must be allowed. We are very much obliged to Mr. Beven for his very learned and interesting argument, but the matter seems to me to lie in a small compass. From my point of view there are only two classes of fixtures, putting aside certain special things like gas fittings, which are provided for under a particular Act of Parliament. The two classes are, first, those fixtures, which when once

(1) 6 Ex. 295.
(2) (1856) 6 E. & B. 876.
(3) (1894) 70 L. T. 217.
(4) (1866) L. R. 1 Q. B. 241.
(5) (1869) L. R. 5 Q. B. 123.
(6) (1859) 7 C. B. (N.S.) 115.
(7) (1856) 2 K. & J. 536.
(8) L. R. 5 Q. B. 306.
(9) [1897] 1 Ch. 182.
(10) (1886) 17 Q. B. D. 619.

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implanted in the soil, become part of the soil and are irremovable except with the consent of the landlord; and, secondly, those fixtures which a tenant is entitled to sever during his tenancy, but which, until they are severed, form part of the freehold, and, if the tenant does not sever them, remain so for all time. Mr. Beven has argued that there is a third class of articles, which may be called fittings, and which are fixtures for some purposes and not for others—that is to say, they are fixtures which pass under a conveyance or at any rate a mortgage of the freehold, but for all other purposes remain simple chattels. I agree that it is possible in law to conceive of articles which pass on a conveyance or mortgage of the freehold, but which do not form part of the freehold. For example, I believe that formerly in the West Indies slaves passed with a mortgage of the freehold. But with regard to fixtures, when there is a conveyance or mortgage of the land, then, as was expressed in *Holland* v. *Hodgson* (1), the fixtures are transferred, not as fixtures, but as part of the land; subject to the power of severance by the tenant which exists in the case of chattels which have been attached to the land, they are part of the freehold, and if so they are not distrainable. It is a strange thing, and I see no principle in it, that a landlord, who will get the articles at the end of the tenancy if the tenant does not remove them, and who could have seized them if they had not been attached to the land, is to be told that by reason of their attachment to the land they have already become his property to such an extent that he must not distrain them. That, however, appears to be the law, and it is due to the fact that the law of distress is partly archaic and very technical. The authorities decide beyond all question that fixtures are not distrainable, and further there is this very remarkable distinction which was drawn in *Poole's Case* (2), that fixtures can be taken in execution by the sheriff, just as he may cut growing corn, though he may not, like a tenant for life without impeachment for waste, cut down trees.

That being the law, the only remaining question is whether this engine is a fixture in either sense, namely, an irremovable fixture, or a fixture severable by the tenant. If it falls within

(1) L. R. 7 C. P. 328, at p. 337. (2) 1 Salk. 368.

either class it is not distrainable. I agree that the Court which decided *Hellawell* v. *Eastwood* (1) would probably have held that the engine is not a fixture, and that is the difficulty which *Hellawell* v. *Eastwood* (1) has given rise to. If the matter were res integra I should like to hold that the engine was a mere chattel, and I would go further and say that if this were a small article most people would say that it was a chattel; but we are bound by authority. The present case seems to me to be indistinguishable from *Hobson* v. *Gorringe* (2), and in my view there is no practical difference between this case and *Reynolds* v. *Ashby*. (3) In *Hobson* v. *Gorringe* (2) there was an engine of a similar description to the engine in this case, and it was fastened down in a similar way, and the only distinction suggested between the two cases is that in the former case a concrete bed had been prepared in which were embedded two iron plates, whereas in the present case there was either a similar bed, or an already existing concrete floor which was cut out and subsequently filled up after the engine had been fitted in. I can see no substantial difference between the facts of the two cases; if anything, I think the present case is rather stronger than *Hobson* v. *Gorringe*. (2) I also think that this case cannot be distinguished from *Reynolds* v. *Ashby* (3), but it is sufficient to say that *Hobson* v. *Gorringe* (2) is a decision of the Court of Appeal, and is a binding authority on us.

I do not pass over the argument that one must take into consideration the position of the parties when deciding whether an article is a fixture or not. It certainly is extraordinary that the plaintiffs can succeed on this extremely fine distinction by saying in effect that the article is their chattel because they could require the tenant to sever it, but that in no other sense is the article a chattel, and therefore the landlord cannot distrain it. It is very artificial, but *Hobson* v. *Gorringe* (2) decides that that position can be taken up against the owner of the article, and the position must be the same as between all parties to the transaction, and whether the suit was instituted by the seller, the mortgagee, or the landlord. If the tenancy had come to an

(1) 6 Ex. 295. (2) [1897] 1 Ch. 182.
(3) [1903] 1 K. B. 87.

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end by surrender and acceptance, or by effluxion of time or through breach of covenant by the tenant, the plaintiffs would have found to their cost that the engine was effectually attached to and formed part of the freehold. The question has, however, arisen at an intervening period, and for the reasons which I have given I am of opinion that the engine was a fixture and not distrainable, and the plaintiffs are therefore entitled to judgment.

WALTON J. I agree. The true effect of Mr. Beven's interesting and able argument is that this engine when it was distrained was a chattel. If it was a chattel, it was distrainable and the judgment of the county court was right. If, on the other hand, it was a fixture, it was not distrainable. That is well established, and I need only refer to Bullen on Distress and *Darby* v. *Harris*. (1) In Bullen on Distress, 2nd ed. p. 105, the law is thus stated: "Whatever is annexed or affixed to the freehold, as kilns, furnaces, cauldrons, kitchen ranges, grates, coppers, shelves fixed to the walls, gas fittings, windows, doors, and the like, cannot be distrained." And in *Darby* v. *Harris* (1) it was held that, although the articles might be tenant's fixtures and severable by him during the term, still they were part of the freehold and not distrainable. Therefore, if this engine was a fixture, although removable by the tenant, it was not distrainable.

The case relied on by the defendant is *Hellawell* v. *Eastwood*. (2) The question there arose as to certain machines, and I will assume that the mode in which those machines were attached to the premises was similar to the method adopted in this case. There is no doubt that the Court did in that case hold that the machines were distrainable although they were attached to the building. Parke B. said (3): "They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out. . . . . They would not have passed by a conveyance or demise of the mill. They never ceased to have the character

(1) (1841) 1 Q. B. 895. (2) 6 Ex. 295.
(3) 6 Ex. at p. 313.

of moveable chattels, and were therefore liable to the defendants' distress."

They were distrainable because they were chattels, and if that is correct, if they were chattels, it follows that they would not pass to the mortgagee under a mortgage of the freehold. I am unable to see any distinction in principle for this purpose between the case of a mortgage and the case of a distress. If the decision in *Hellawell* v. *Eastwood* (1) is binding on us, as the county court judge held it was binding on him, the judgment appealed from must be affirmed. But there have been many cases since *Hellawell* v. *Eastwood* (1) in which this question has had to be considered, and, although the principles of law as stated in *Hellawell* v. *Eastwood* (1) have been accepted as correct, it has over and over again been doubted whether those principles had been correctly applied to the facts of that case. I do not intend to go through all the cases, but I will refer to the recent case of *Hobson* v. *Gorringe*. (2) The facts there were very similar to those of *Hellawell* v. *Eastwood* (1), and it was contended that the machine was a mere chattel, and that there was no intention that it should form part of the freehold, and that consequently it did not pass under a mortgage of the freehold. That case, like the present, was a case of a hire-purchase agreement, with power reserved to the vendor to resume possession of the article in certain circumstances. Notwithstanding the decision in *Hellawell* v. *Eastwood* (1), and that the method of attachment was practically the same as in that case, the Court of Appeal held that the article, a gas engine, was a fixture and part of the freehold, and that it therefore passed to the mortgagee under the mortgage. The Court, in giving judgment, pointed out that it did not, and could not, pass as a chattel, but as part of the land, removable, no doubt, as a tenant's fixture, but still a fixture. The effect of that decision is, it seems to me, that it must now be taken that the law was not correctly applied in *Hellawell* v. *Eastwood*. (1) The decision in *Hobson* v. *Gorringe* (2) is binding on us, and we must follow it by holding that the engine in the present case was a fixture and part of the freehold, and therefore not distrainable.

(1) 6 Ex. 295.

(2) [1897] 1 Ch. 182.

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For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitor for plaintiffs: *H. E. Tudor.*

Solicitors for defendant: *R. Voss & Son.*

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Nov. 7, 8.

[IN THE COURT OF APPEAL.]

DEWAR *v.* GOODMAN.

Landlord and Tenant—Covenant running with the Land—Covenant by Lessor to perform Covenants of Head Lease—Collateral Covenant.

A lease for a term of years of certain land contained a covenant by the lessee to keep in repair all buildings erected on the land, and a proviso for re-entry for breach of that covenant. Two hundred and eleven houses were erected on the land. An underlease was granted of two of the houses, and the underlessor covenanted for himself and his assigns with the underlessee and his assigns for the performance of the covenants of the superior lease so far as they related to the premises comprised in the superior lease but not demised by the underlease. The plaintiff was the assignee of the underlease, and the land demised by the superior lease, including the land demised by the underlease, became vested in the defendant for the residue of the term, subject to the underlease. The superior lessor re-entered on all the land demised by the superior lease in consequence of the defendant's failure to perform the covenant to repair in that lease, and ejected the plaintiff from the two houses demised by the underlease. The plaintiff sued the defendant, in respect of this ejectment, for damages for breach of the covenant in the underlease:—

Held (affirming the judgment of Jelf J., [1907] 1 K. B. 612), that the action was not maintainable, for the covenant to perform the covenant in the superior lease relating to premises not demised by the underlease, being a covenant not to be performed on the demised premises, was only a collateral covenant, and therefore not binding on the assigns of the underlessor, though named.

Doughty v. *Bowman*, (1848) 11 Q. B. 444, discussed.

Sampson v. *Easterby*, (1829) 9 B. & C. 505; (1830) 6 Bing. 644, distinguished.

APPEAL of the plaintiff from the judgment of Jelf J. at the trial of the action without a jury (reported [1907] 1 K. B. 612).

The facts (so far as material to this report) were as follows:—The action was brought by the plaintiff, as assignee of

an indenture of underlease dated July 13, 1886 (demising a parcel of land in Chelsea with two houses upon it), against the defendant, as assignee of an indenture of lease dated May 6, 1820, to recover damages for breach of covenants contained in the underlease of July 13, 1886.

The lease of May 6, 1820, was from Lord Pomfret and others to one Whitehead for eighty-nine years, and contained, amongst others, a covenant by the lessee to keep all buildings erected on the land in good repair and a proviso for re-entry on breach of the said covenant.

At the date of the underlease of 1886 the lease had become vested in one Barns for the residue of the term.

By the indenture of underlease made between Barns, "who and whose heirs, executors, administrators, and assigns" were therein referred to as "the lessor," and one Humphrey, "who and whose heirs, executors, administrators, and assigns" were therein referred to as "the lessee," a part of the land demised by the lease of 1820 together with two houses thereon were demised to the lessee for twenty-two and a half years, less three days, subject to a peppercorn rent and to the covenants and conditions therein contained. The underlease contained a covenant by "the lessee" to repair and to keep in repair and to repair after notice the two houses; and covenants by "the lessor"—(1.) for quiet enjoyment; (2.) for the performance by "the lessor" of the several covenants and conditions contained in the indenture of lease of 1820 so far as the same related to or affected that part of the property included in the lease of 1820, but not demised by the underlease of 1886; and (3.) a covenant of indemnity.

The said covenants by "the lessor" were as follows: "And the lessor doth hereby covenant promise and agree to and with the lessee that such lessee well and truly paying the said yearly rent hereby reserved if and when demanded and observing fulfilling and keeping the covenants clauses conditions and agreements herein before mentioned and contained and on the part and behalf of such lessee to be observed performed fulfilled and kept shall and lawfully may peaceably and quietly enter into and upon have hold use occupy possess and enjoy the said premises hereby demised or expressed or intended so to be and every part thereof

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with the appurtenances for and during the said term hereby granted without any let suit trouble molestation disturbance interruption or denial of from or by the lessor or any other person or persons claiming under or in trust for such lessor. And further that such lessor will or shall at all times hereafter during the said term pay the whole of the yearly rent reserved by and observe perform or comply with the several covenants and conditions contained in the indenture of lease dated the 6th day of May 1820 under which the lessor holds the said premises and which on the part of the lessee or assignee therein named are or ought to be paid observed or complied with respectively so far as such covenants and conditions relate to or affect that part of the premises included in the said indenture of lease which is not hereby demised. And also that such lessor will or shall from time to time and at all times hereafter save harmless and keep indemnified the lessee and the estate and effects of such lessee from and against all actions suits and other proceedings which shall be commenced or prosecuted against the lessee and all costs losses damages and expenses which such lessee shall respectively incur or suffer by reason of the non-payment of the said rent or the non-observance or non-performance of all or any one or more of the several covenants and conditions reserved and contained by and in the said indenture of lease so far as the said covenants and conditions relate to or affect that part of the premises included therein which is not hereby demised."

The underlease ended with the following proviso: "Provided always and it is expressly agreed and declared by and between the parties hereto that the covenants and indemnity lastly hereinbefore contained on the part and behalf of the lessor are entered into and given by him with the intention of binding such lessor his real and personal representatives only whilst he or they continue to hold the reversion expectant upon the term hereby granted and of binding so far as can be any other person or persons for the time being entitled to such reversion."

On February 16, 1903, the plaintiff became the assignee of the underlease of 1886 for the residue thereof. On September 24, 1904, the Chelsea Development Company, Limited, acquired

the reversion expectant on the determination of the term created by the lease of 1820. Ultimately all the land demised by the lease of 1820, except certain portions previously disposed of, but including the portion demised by the underlease, became vested in the defendant for the residue of the term granted by the lease of 1820, subject to the underlease of 1886.

It was admitted that the defendant had broken the lessor's covenant contained in the underlease of 1886 in failing to perform the covenants to repair contained in the lease of 1820, and to comply with a notice served on September 29, 1904, on the defendant or his predecessor in title by the Chelsea Development Company, Limited, to repair 209 houses on that part of the land not comprised in the underlease of 1886, and the two houses comprised in that underlease.

In December, 1904, the company gave the plaintiff notice in writing of the service of the notice upon the defendant. In February, 1905, the company commenced an action against the defendant in the King's Bench Division to recover possession, and in the same month gave notice to the present plaintiff of the issue of that writ, so that he might be cognizant of the proceedings and apply for relief if he so desired. The plaintiff, however, did not do so, nor did he do any repairs to the two houses.

In December, 1905, the company obtained judgment against the defendant for possession of all the property demised by the lease of 1820 (except the portions mentioned above, which had not become vested in the defendant). The plaintiff was ejected under this judgment, and lost the rent of the property held by him under the underlease. It was admitted that the plaintiff, at the time of his ejectment, was in default in respect of the repairs to the two houses, and that the cost of the necessary repairs would be 30*l.*

It was agreed that if the plaintiff should be held entitled to recover in this action the damages should be 154*l.* 11*s.* 6*d.*

Jelf J. gave judgment for the defendant. The plaintiff appealed.

W. Copping, for the plaintiff. Two points arise: first, whether the benefit and burden of covenants (1.) and (2.) in the underlease

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of 1886 run with the land and reversion respectively; secondly, whether the observance by the plaintiff of the covenants in that underlease is a condition precedent to his right to bring this action against the defendant. The effect of the covenant in the underlease of 1886 that the lessor will perform the covenants in the superior lease with regard to land not included in the underlease is to enlarge the covenant for quiet enjoyment in the underlease into a covenant against disturbance by the superior landlord by virtue of a breach of covenant contained in the lease of 1820. The benefit and burden of covenants (1.) and (2.) in the underlease of 1886 run with the land and reversion respectively. A statutory right of action was given to the assignee of a term against the assignee of the reversion in respect of breaches of covenant of this kind by 32 Hen. 8, c. 34. By that statute the burden of the covenant is to run with the reversion.

In *Spencer's Case* (1) it was resolved that a covenant by the lessee to do something upon the land demised, e.g., to build a wall, does not bind the lessee's assignee if the assigns are not named, but does bind the assignee if the assigns are named in the covenant. The present case is the converse of *Spencer's Case* (1), and the same propositions of law apply. The covenants (1.) and (2.) run with the land and bind the defendant, inasmuch as the assigns are named. By a "collateral personal covenant" is meant one which is beneficial to the lessee without regard to his continuing owner of the estate. In the present case the covenants (1.) and (2.) are not merely "collateral personal covenants," because they are not beneficial to the lessee if he parts with his estate. They are necessary for the preservation of the plaintiff's estate, and remain of benefit to him simply for that reason. He has no other interest in it. Therefore they cannot be collateral. Upon the assumption that the covenant to observe the covenants in the superior lease enlarges the covenant for quiet enjoyment, *Campbell* v. *Lewis* (2) is conclusive in favour of the plaintiff, for it shews that a covenant for quiet enjoyment runs with the land.

The judgment of Best J. in *Vernon* v. *Smith* (3) shews that if

(1) (1582) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.

(2) (1820) 3 B. & A. 392.

(3) (1821) 5 B. & A. 1.

a covenant is given with respect to the thing demised, and is co-extensive with the estate of the person with whom it is made and is made for the covenantor and his assigns, it binds the assigns of the covenantor. The only question is, Does the covenant concern the thing demised? In Foà on Landlord and Tenant, 3rd ed. at p. 381, it is said that "The following are further illustrations of such covenants or agreements" (i.e., which do not impose liabilities on the assignee): "on the part of the lessor a covenant to perform the covenants of a head lease or in default to indemnify the lessee"; and the same proposition is laid down in Woodfall on Landlord and Tenant, 17th ed. p. 187, and Leake on Contracts, 5th ed. p. 863. But in *Doughty* v. *Bowman* (1) the ground of the judgment was that the assigns were not named in the covenant. The decision in that case shews that if the assigns are named, as in the present case, the assignees are bound. The editors of those works have failed to notice the true ground of the judgment in *Doughty* v. *Bowman*. (1) The meaning of the judgment is that if the assigns had been named they would have been bound.

In considering whether a covenant "touches or concerns" the thing demised within the meaning of *Spencer's Case* (2), it is necessary to divest the mind of the idea of matter and consider the lessee's estate. If the covenant is beneficial to the lessee after he has parted with his estate in the land, it is collateral and does not run with the land. In the present case no one is benefited except the owner of the estate. The covenant to repair the 209 houses is so beneficial to the plaintiff's estate that a breach of it destroys the estate. The decision in *Thomas* v. *Hayward* (3) is wrong. But the case is distinguishable, as the covenant not to build a public-house has no relation to the covenant to repair in the present case.

As to the contention that observance by the plaintiff of his covenants was a condition precedent to his right of action, the right to eject him never arose in the defendant, as he never gave the plaintiff the notice required by s. 14 of the Conveyancing Act, 1881. Further, the covenants are separate and independent:

(1) 11 Q. B. 444.
(2) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.
(3) (1869) L. R. 4 Ex. 311.

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Boone v. *Eyre* (1); *Edge* v. *Boileau.* (2) [*Clegg* v. *Hands* (3); *Bally* v. *Wells* (4), *Vyvyan* v. *Arthur* (5), *Hooper* v. *Clark* (6), *White* v. *Southend Hotel Co.* (7), *Chapman* v. *Smith* (8), *Mayor of Congleton* v. *Pattison* (9), *Stevens* v. *Copp* (10), and *Gower* v. *Postmaster-General* (11) were also referred to.]

Atherley-Jones, K.C. (*Sidney Goodman* with him), for the defendant. The plaintiff could have obtained relief in respect of his non-repair of the two houses by an application under s. 4 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13). The foundation of a covenant running with the land as between lessor and lessee is privity of estate: *Rogers* v. *Hosegood.* (12) In the present case the privity of estate does not exist. The whole course of the authorities, which up to the year 1834 are summed up in *Keppell* v. *Bailey* (13), shew that in connection with the question of covenants running with the land the word "estate" is used as equivalent to land. The test is, Does the covenant touch or concern the land demised?—*Bally* v. *Wells.* (4) All the cases cited on the other side are cases where the covenant which was held to run with the land related to something to be done on or in respect of the land demised and was for the benefit of the land demised.

[LORD ALVERSTONE C.J. It seems to have been assumed in *Doughty* v. *Bowman* (14) that if assigns had been named they would have been bound.]

The only point actually decided in *Doughty* v. *Bowman* (14) was that a covenant to do something on the land demised, a thing not in esse at the time of the demise, does not run with land if assigns are not named; and in *Minshull* v. *Oakes* (15) the Court expressed a doubt as to the ratio decidendi in *Doughty* v. *Bowman* (14): see also Smith's Leading Cases, 11th ed. vol. 1, p. 70. *Doughty* v. *Bowman* (14) is no authority for the proposition

(1) (1777) 1 H. Bl. 273, n.
(2) (1885) 16 Q. B. D. 117.
(3) (1890) 44 Ch. D. 503.
(4) (1769) 3 Wils. 25.
(5) (1823) 1 B. & C. 410.
(6) (1867) L. R. 2 Q. B. 200.
(7) [1897] 1 Ch. 767.
(8) [1907] 2 Ch. 97.
(9) (1808) 10 East, 130.
(10) (1868) L. R. 4 Ex. 20.
(11) (1887) 57 L. T. 527.
(12) [1900] 2 Ch. 388.
(13) (1834) 2 My. & K. 517.
(14) 11 Q. B. 444.
(15) (1858) 2 H. & N. 793.

that where assigns are named a covenant to be performed off the land demised runs with the land.

[He was stopped.]

Copping, in reply. In *Sampson* v. *Easterby* (1) a lease of certain mines contained a covenant by the lessee to build and keep in repair a smelting mill on land which was not part of the land demised, and it was held that the benefit of the covenant passed to the assignee of the reversion.

[Buckley L.J. referred to *Woodall* v. *Clifton*. (2)]

Lord Alverstone C.J. In this case we are asked to reverse the judgment of Jelf J., who has held that the action cannot be maintained. Speaking for myself, I wish to say that I am greatly indebted to Mr. Copping for his very able argument, and I think that much that has been said by him would be strong ground for holding that a lessee in the circumstances of this case ought to be allowed by the law to have a remedy against the assignee of the lessor, but there is a strong line of authorities which, in my opinion, prevents us from giving effect to that argument. The question which we have to decide arises in this way. In 1820 a lease of certain land was granted, which contained a covenant on the part of the lessee to keep in repair all buildings erected on the land. Houses to the number of 211 were erected on the land. In 1886 Barns, in whom the lease of 1820 had become vested, sub-demised two of the houses to Humphrey, the underlease containing a covenant by Humphrey to keep the two houses in good repair and covenants by Barns and his assigns for quiet enjoyment and for the performance of the covenants in the head lease, and for an indemnity against their non-performance. The underlease also contained a proviso which is not without significance as shewing that the parties had some doubt as to the effect of the covenants in the underlease, because it provided that the lessor, that is, Barns, should only be bound by the covenants whilst he held the reversion, and that it was the intention of the parties that the covenants should bind "so far as can be" any other persons for the time being entitled to the reversion. The plaintiff is the assignee of

(1) 9 B. & C. 505; 6 Bing. 644. (2) [1905] 2 Ch. 257.

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Humphrey, and the defendant is the assignee of Barns. The plaintiff was ejected by the head landlord for a breach of the covenant in the head lease to repair all the houses including the two demised by the underlease. In respect of that ejectment the plaintiff sues the defendant on the covenants contained in the underlease.

For the purpose of my judgment I will assume that, if the complaint as to non-repair had related only to the two houses occupied by the plaintiff, there would have been no ejectment of the plaintiff. I do not base my judgment in any way on any question as to whether the plaintiff, having himself been under covenant to keep those two houses in repair, is thereby precluded from maintaining this action. The real question which we have to consider is whether the lessor's covenants in the underlease are covenants which run with the land. It has been pointed out by Jelf J. in his most carefully considered judgment that the law on this subject is fenced round with technicalities, but he suggested that it might be possible for this Court to take a broader view of the matter than he felt bound to take, and to break through those technicalities. In my opinion it is not possible for us to deal with this case in the way contended for in the argument for the plaintiff without introducing entirely new principles, and overruling one if not two cases. It was said in argument that it was assumed in *Doughty* v. *Bowman* (1) that a covenant of the kind in question in this case would bind the assignee of the reversion, if assigns were named in the covenant. I was at first somewhat impressed with that, but I had not quite appreciated the facts of that case. There was in *Doughty* v. *Bowman* (1) a covenant by the lessee to erect certain houses on the demised land; the lessee sub-demised to the plaintiff, and covenanted with him to perform all the lessee's covenants in the lease, but not naming assigns. The lessee afterwards assigned to the defendant, and the question was whether the lessee's covenant to perform the covenant as to building the houses was binding on the defendant. I agree that the judges assumed that if assigns had been named in the covenant it would have been binding on them, but it is clear, I think, that the decision really

(1) 11 Q. B. 444.

turned on the distinction between the thing to be done on the land being in esse or in posse at the time of the demise, for Patteson J. in his judgment said (1): "There are two sorts of covenants, the one binding the assignee of land whether named or not, the other not binding him unless he is named. If the covenant in question be considered as a covenant to build houses, then it relates to a thing not in esse at the time of demise, and does not bind the assignee of the land, as he is not named"; and Parke B. said (2): "The first resolution in *Spencer's Case* (3) applies here, and so does the first of the two answers given by my brother Patteson in the present case. Assigns are not named, and the covenant, concerning a thing not in esse at the time of the demise, does not pass to assigns unnamed." It is quite clear from those passages that the Court there was not considering the question of a covenant to do something on land other than that demised. This view is borne out by the comments on *Doughty* v. *Bowman* (4) made in *Minshull* v. *Oakes* (5), and both cases are referred to in Smith's Leading Cases, vol. 1, 11th ed., pp. 70, 71, as authorities for the proposition that covenants as to things not in existence at the time of the demise are not binding on assigns if they are not named. The covenant in the present case is a covenant to do something on land which was not the subject of the demise, but it is contended for the plaintiff that, as the performance of the covenant was for the benefit and protection of the sub-lessee and concerned his interest or estate in the land, that is sufficient to bind the assigns, and cases were cited for the purpose of shewing that the terms "estate" and "land" were in this connection to be treated as equivalent. But the important thing to observe with regard to the cases cited was that in every one of them the covenant did touch and concern the land demised in the strictest sense of the word, and moreover it must be remembered that observations as to covenants for quiet enjoyment must always be read as applying to the particular facts of each case.

(1) 11 Q. B. at p. 448.
(2) Ibid. at p. 454.
(3) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.
(4) 11 Q. B. 444.
(5) 2 H. & N. 793.

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The case of *Sampson* v. *Easterby* (1) was cited in reply as an instance of a covenant to do something on land other than the land demised which was held to run with the land. That was a case where there was a lease of minerals in or under certain moors or waste lands, and there was a covenant by the lessees to erect a new smelting mill on part of the waste. It was held that the covenant passed with the reversion, but the decision proceeded upon the ground that the erection of the new mill was a matter so closely connected with the working of the mines that it tended to the support and maintenance of the thing demised. The facts in that case were of such a very special character that the case cannot in my opinion be regarded as an authority in favour of the plaintiff's contention in the present case. We have been much pressed in the course of the argument with two cases—*Thomas* v. *Hayward* (2) and *Gower* v. *Postmaster-General*. (3) In *Thomas* v. *Hayward* (2) there was a lease of a public-house, and the lessor covenanted not to build or keep any house for the sale of beer or spirits within half a mile of the demised premises. I think that it would be difficult to imagine a covenant more closely connected with the lessee's interest in the demised premises, in the sense in which Mr. Copping uses the words, than a covenant of that kind, but the Court held that the covenant did not pass to the assignee of the lessor. Bramwell, B. said: "The covenant does not touch or concern the thing demised. It touches the beneficial occupation of the thing, but not the thing itself." It is said that the case cannot now be considered as good law, but I cannot accept that view. I think the judges who decided it recognized the distinction between things to be done on the land demised and things to be done on other land, although there might be the closest connection between the thing to be done and the interest of the lessee in the land demised. The decision of Kay J. in *Gower* v. *Postmaster-General* (3) is another illustration of the same principle. In that case Kay J., after referring to *Spencer's Case* (4), said: "Now, it was attempted to be argued in the present case that these

(1) 9 B. & C. 505; 6 Bing. 644.
(2) L. R. 4 Ex. 311.
(3) 57 L. T. 527.
(4) 5 Rep. 16: 1 Smith, L. C. 11th ed. p. 55

taxes, tithes, and so forth, although no doubt in respect of a part of the property which was not demised, yet they possibly might be charged on the whole tenement. That point, however, is not raised by the special case at all. What I have to deal with is distinctly a case in which the taxes, tithes, &c., are separately payable in respect of the property which is not demised. That is the only case I have to deal with, so far as anything appears in the special case which I am asked to determine. The taxes, tithes, &c., are separately payable by the occupier in respect of the undemised part of the tenement. I mean undemised by the lease. Therefore it comes within the operation of the rule in *Spencer's Case*. (1) Of course the lessee covenanted, but he is not before me; the only person brought before me is his assign." It seems to me that that recognition of the principle by Kay J. is another instance of the necessity of applying a rule which we are asked on behalf of the plaintiff to depart from. It was further contended that the decision of Jelf J. was inconsistent with *Clegg* v. *Hands*. (2) I do not think so. I think that the facts of that case and the nature of the covenant render the case clearly distinguishable from the present case.

In my opinion, having regard to the original foundation of the rule in *Spencer's Case* (1) and to the way in which that rule has been applied in numerous cases, it is impossible to say that Jelf J. came to a wrong conclusion in holding that this action failed. For these reasons the appeal must be dismissed.

BUCKLEY L.J. (after stating the facts). Before dealing with the main question in the case I desire, out of respect to Mr. Atherley-Jones, to say a word as to the point raised by him on the question of privity of estate. There clearly was privity of estate between the plaintiff and the defendant; the defendant was entitled to the reversion in the two houses expectant on the termination of the plaintiff's interest. There was, of course, no privity as regards the remaining 209 houses. The plaintiff had no estate in those.

That being so, the important question which we have to

(1) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.

(2) 44 Ch. D. 503.

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consider is whether a certain covenant in the underlease to the plaintiff's predecessor runs with the land. There is no branch of our law so technical as that relating to covenants running with the land. The contention for the plaintiff may, I think, be summarized as follows: A covenant to do an act, not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in the demised premises, is a covenant which runs with the land. If that proposition is true, it is wholly new. It may nevertheless be true, but I am not aware of any authority in support of it. The nearest authority cited in its support is *Sampson* v. *Easterby* (1), but when that case is examined I do not think it gives any support to the proposition. There was there a demise of mines and minerals, and the lease contained a covenant by the lessee to build a smelting mill on land other than the land demised. The first observation which I have to make with regard to the case is that it is not the fact that the lessee had no estate or interest in the mill which was to be built. The object of the covenant in the lease as to building the mill was to provide for the more effectual working of the mine, and the lessee had some interest in, and a right to enter, the other lands of the lessor for the purpose of building it and using it. When I look at the judgment of Alexander C.B. (2), I find that he based his judgment on the case of *Mayor of Congleton* v. *Pattison* (3), and quoted the following passage from Lord Ellenborough's judgment in that case: "A covenant in which the assignee is specifically named, though it were for a thing not in esse at the time, yet being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or *if it affected the mode of enjoying it.*" The fact of those last words being italicized in the report of Alexander C.B.'s judgment would seem to indicate that the learned Chief Baron placed special emphasis on them as being particularly applicable to the question with which he was dealing in *Sampson* v. *Easterby* (1), and shews, I think, that he attached importance to the fact

(1) 9 B. & C. 505; 6 Bing. 644. (2) 6 Bing. at p. 652.
(3) 10 East, 130, at p. 135.

that the user of the mill was immediately connected with the demise of the mines, and that the lessee had the right to go on to the lessor's land for the purpose of erecting and using the mill. That is the case which is admittedly the best case which Mr. Copping can produce as an authority for his proposition. In my opinion it does not support that proposition.

We have been much pressed, and rightly pressed, with the case of *Doughty* v. *Bowman* (1), but there are two reasons why it does not, to my mind, support the general proposition contended for in this case. In the first place, the act which was the subject-matter of the covenant was an act to be done on the demised premises; and, secondly, assigns were not named in the covenant, and it is only by inference that we can arrive at the conclusion that if assigns had been named the Court might have arrived at a different result.

The decision of Kay J. in *Gower* v. *Postmaster-General* (2) is an authority against the general proposition, for there an underlease contained a covenant by the lessee that he would pay all such sums as should be payable by the lessor on account of taxes, rates, and outgoings in respect of premises comprised in another underlease, so that the lessee was covenanting to do for the benefit of the lessor of the demised premises something in connection with premises not demised to him. Kay J. held that the covenant was not one running with the land, and though I agree that the decision does not touch the exact point raised here, namely, that the performance of the covenant was necessary to protect the estate of the covenantee, yet the same principle is applicable to both cases. I do not myself place quite so much reliance as my Lord does on *Thomas* v. *Hayward*. (3) I think it may be distinguished from this case, for the judgment there appears to have been rested on this, that a covenant to do off the land demised something which will increase the profits to be made on the land demised is a covenant affecting, not the demised land, but the profits to be derived from the business carried on on the demised land. *Campbell* v. *Lewis* (4) was also relied on by plaintiff as an authority in his

(1) 11 Q. B. 444.
(2) 57 L. T. 527.
(3) L. R. 4 Ex. 311.
(4) 3 B. & A. 392.

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favour. It is true that in that case Bayley and Holroyd JJ. stated that in their opinion a covenant for quiet enjoyment was one running with the land, but I doubt whether that was matter of decision; the case was really decided on the question of privity of contract; in the judgment of Abbott C.J. there is no reference to the question of the covenant running with the land.

The only other case to which I wish to refer is *Woodall* v. *Clifton* (1), where there was a lease under which the lessee had an option to buy the fee simple at any time during the term, which was, of course, a matter in one sense directly affecting the demised premises. The decision has only an indirect bearing on the question which we are now considering, but the reason I refer to it is that nearly all the cases which have been cited to us were referred to and discussed in the course of the arguments, and it is impossible to read the judgments without seeing that the Court was not disposed to extend the doctrine of covenants running with the land to cases which are really an extension of the second resolution in *Spencer's Case*. (2)

There is only one other observation that I desire to make, and that is one which is peculiar to the present case. As between the plaintiff and the defendant the obligation to keep the two houses in repair was on the plaintiff, and the obligation to keep the remaining 209 in repair was on the defendant. The superior lessor entered for breach of the covenant to repair in respect of the whole number of houses, namely, 211; that is to say, he entered by reason of the failure to do an act which as to part ought, as between the plaintiff and the defendant, to have been done by the plaintiff and as to part by the defendant. There would, I think, be considerable difficulty in holding that the plaintiff had a cause of action against the defendant in respect of his failure to do an act which in part had to be performed by the plaintiff himself.

KENNEDY L.J. I agree that this appeal fails, and as the authorities have already been so fully dealt with I have very little to add. I prefer to rest my judgment, not on the last point dealt

(1) [1905] 2 Ch. 257. (2) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.

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with by Buckley L.J., but on the other grounds stated by him and by my Lord. For the reasons which they have given I agree that the plaintiff has failed to satisfy this Court that Jelf J. was wrong in holding that a covenant to do an act not on the land demised, but elsewhere, which might only possibly, or even probably, benefit the sub-lessee, was a covenant which could be called either on principle or authority a covenant running with the land.

Appeal dismissed.

Solicitors for plaintiff: *Harold Edwards & Cohn.*
Solicitors for defendant: *Nash, Field & Co.*

F. O. R.

CLINTON *v.* BENNETT.

1907
Oct. 31.

Practice—County Court—Costs—Scale—Claim for Injunction—Alternative and independent Claim—No Injunction granted—Judgment on alternative Claim for Sum not exceeding 10*l.*—*County Court Rules*, 1903, *Order* LIII., *rr.* 1, 11.

Order LIII., r. 11, of the County Court Rules, 1903, provides that in actions in which a perpetual injunction is claimed, whether the same is granted or not, the judge may order the costs to be taxed under column A, B, or C, and in default of any such order they shall be taxed under column B.

In an action in the county court in which a perpetual injunction was claimed there was added another claim which was alternative to and inconsistent with the claim for an injunction. The plaintiff failed as to the injunction, but got judgment on the other branch of the claim for 4*l.* 4*s.* and costs. No application was made to the judge for an order directing under which scale the costs should be taxed, and on an application to review the taxation the judge held that under Order LIII., r. 11, in default of any order, the costs must be taxed under column B:—

Held that, the claim on which the plaintiff had recovered judgment being entirely distinct from the claim for an injunction, the case was governed, not by r. 11, but by r. 1 of Order LIII., and that under r. 1 the costs must be taxed under the lower scale, that being the scale applicable to the amount recovered.

DEFENDANT'S appeal from an order of the judge of the Worcester County Court, made on an application to review the registrar's taxation of the plaintiff's costs of the action.

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The plaintiff, by his particulars of claim in the action, claimed an injunction to restrain the defendant from interfering with the plaintiff's quiet enjoyment of certain premises of which the plaintiff was the defendant's tenant under an agreement for a lease; alternatively the plaintiff claimed 20*l.* for compensation due under the agreement on the determination of the tenancy for improvements.

The county court judge at the trial held that the tenancy had been determined, and that the claim for an injunction therefore failed; on the alternative claim he gave judgment for 4*l.* 4*s.* He also gave the plaintiff costs, but he made no order as to the scale under which the costs should be taxed, and no application was made at the trial for any such order.

The registrar taxed the plaintiff's costs under the lower scale in Part IV. of the Appendix to the County Court Rules (which applies to actions "where the amount recovered exceeds 2*l.* and does not exceed 10*l.*"), on the ground that the issue on which the plaintiff recovered judgment was an entirely separate cause of action from the claim for an injunction.

On an application by the plaintiff to the county court judge to review the taxation the judge held that, the plaintiff having claimed a perpetual injunction, the costs, in default of any other order having been made by him, must, under Order LIII., r. 11, of the County Court Rules, 1903 (1), be taxed under column B.

The defendant appealed.

Milward, for the defendant. The county court judge has overlooked the fact that in this case there were two entirely separate causes of action, not merely alternative, but antagonistic, and that the issue on which the plaintiff succeeded had nothing to do with the claim for an injunction. In these circumstances Order LIII., r. 11, has no application. That rule is a special rule intended to meet the difficulty which would otherwise arise from the fact that,

(1) Order LIII., r. 11, of the County Court Rules, 1903, provides that: "In actions in which a perpetual injunction is claimed, whether the same is granted or not, ... the judge may order the costs to be taxed under column A, B, or C, and in default of any such order they shall be taxed under column B."

the scale of costs allowed in the county court being dependent on the amount recovered, there would in the case of a claim for an injunction be no scale applicable; but r. 11 was not intended to overrule the general law provided by s. 113 of the County Courts Act, 1888, and, there being no rule applicable to a case in which a plaintiff fails as to his claim for an injunction and succeeds in recovering a sum not exceeding 10*l.* on an entirely separate cause of action, s. 164 of the Act of 1888 provides that the general principles of practice in the High Court shall be applied. According to that practice the plaintiff gets the costs of the issues on which he succeeds: *Hoyes* v. *Tate* (1); and therefore in the present case the separate issues must for the purpose of taxation be regarded as separate actions, and the plaintiff is only entitled to such costs as are applicable to a judgment for a sum not exceeding 10*l.*

R. V. Bankes (*W. de B. Herbert* with him), for the plaintiff. Sect. 113 only applies where costs are not otherwise provided for. The costs in a case in which a perpetual injunction is claimed, whether it is granted or not, are provided for by Order LIII., r. 11, and, therefore, the only question is as to the meaning of that rule. The intention was to give a very wide discretion to the county court judge in cases where an injunction is claimed. The language of the rule is quite general, and there is no foundation for the suggestion that the different issues in an action in which an injunction is claimed are to be treated separately for the purpose of costs. The fact that the defendant has got to pay costs under column B is solely due to his omission to ask the judge at the trial to make an order as to the scale; but in the absence of any order the language of the rule is clear and peremptory that the costs "shall be taxed under column B."

[WALTON J. If an application had been made to the judge at the trial, he was bound to order taxation under either column A, B, or C. There is no power under r. 11 to order costs on the lower scale, which, under Order LIII., r. 1, is the scale applicable to cases where the amount recovered does not exceed 10*l.* Why is this case not within Order LIII., r. 1 ?]

(1) [1907] 1 K. B. 656.

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Because it is an action in which a perpetual injunction was claimed.

Milward replied.

PHILLIMORE J. This case raises a difficult question. No doubt it would seem, at the first blush, that the county court judge has strictly applied Order LIII., r. 11, of the County Court Rules, for the action was one in which a perpetual injunction was claimed, but a consideration of the consequences which would otherwise follow leads me to the conclusion that the language of that rule has not the compelling effect which the county court judge attributed to it. He considered that he was bound by the rule to hold that, as no order had been made at the trial as to the scale on which the costs should be taxed, they must be taxed under column B. Even if the matter had been brought to his attention at the trial, I do not think that he could have made under that rule any order which would have been of much assistance to the defendant, for he could not have given costs on any scale lower than column A; and it does seem to follow, if r. 11 is alone considered, that if a plaintiff chooses to tack on to an ordinary money claim for less than 10*l.* a claim for an injunction, however absurd and unfounded the claim for an injunction may be, the county court judge must, if he gives costs at all, give them at least under scale A; whereas if a plaintiff who does not claim an injunction recovers less than 10*l.* he only gets costs on what is called the lower scale, that is, a scale less than column A.

In the present case the plaintiff's claim was two-fold. He first claims an injunction, and that part of his claim is based on the assumption that he is still the defendant's tenant in possession, and that the defendant is trying to eject him; then, secondly and in the alternative, he claims on the footing that the tenancy has been determined and he is entitled to compensation for improvements. The plaintiff failed to prove that his tenancy was still subsisting, and therefore he failed as to the claim for an injunction; but, because he failed as to that, he succeeded as to the second branch of his claim and recovered judgment for 4*l.* 4*s.* with costs. That being a sum not exceeding 10*l.* is one to

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which neither column A, B, nor C, is applicable, but it is said, and said truly, that this was an action in which a perpetual injunction was claimed, and it is contended that, as no order was made at the trial as to the scale of costs, it follows from the express language of Order LIII., r. 11, that the costs must be taxed under column B. We must, however, look at the other rules, and it seems to me that, if the county court judge's construction of r. 11 is right, we find a contradiction with Order LIII., r. 1, which provides that, "In every action or matter in any court all costs shall be taxed by the registrar of such court according to the scale of costs in Part IV. of the Appendix." I turn to Part IV., and I find there the scales of costs and allowances to witnesses. The first one is headed "Lower Scale," and contains the "costs to be paid to solicitors in actions and matters . . . . where the amount recovered"—not claimed, but recovered—"exceeds 2*l.* and does not exceed 10*l.*" There is a footnote to the scale, which says that "no other costs are to be allowed than the above where the amount claimed does not exceed 10*l.* unless the judge certifies under s. 119 of the County Courts Act, 1888, or otherwise orders pursuant to Order LIII." There we get the word "claimed." Sect. 119 gives power to the judge in certain cases to award costs on a higher, but not on a lower, scale than would otherwise be applicable, and there are in Order LIII. other enlarging powers in the matter of costs to which it is not necessary to refer. It seems to me that it may very well be contended that to award costs in this case under column B sins against r. 1 of Order LIII. just as much as awarding costs on any scale less than column B may be said to sin against r. 11, and in these circumstances I feel myself at liberty to read r. 11 as meaning that, in an action where a perpetual injunction is claimed and there is another distinct cause of action added, it is only with regard to the issues relating to the claim for the injunction that the costs, if any, are to be taxed under column B, and that where the plaintiff fails as to the claim for an injunction and recovers a sum not exceeding 10*l.* on a distinct issue, he is not entitled, in the absence of an order, to costs under column B, but only to the costs applicable to the amount recovered. For these reasons I am of opinion that the registrar

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rightly taxed the plaintiff's costs under the lower scale, and this appeal must, therefore, be allowed.

WALTON J. I agree. It is very difficult, in my opinion, to give a satisfactory construction to r. 11 of Order LIII. as applicable to a case like the present. Order LIII. provides the scale of costs applicable to different cases. Under r. 1 the scale is made to depend on the amount recovered, and in cases where the amount recovered is more than 2*l.* and does not exceed 10*l.* the scale is that which is called in Part IV. of the Appendix the "lower scale." Then in r. 11 provision is made for cases where a perpetual injunction is claimed. In the present case there were two entirely separate causes of action, one a claim for an injunction which failed, and the other a money claim, in respect of which the plaintiff recovered 4*l.* 4*s.*, for which sum judgment was given with costs. The plaintiff contends that the case comes within the words of r. 11, being an action "in which a perpetual injunction is claimed, whether the same is granted or not," and that in the absence of any order directing the costs to be taxed under column A, B, or C, they must be taxed under column B. I think that that is an erroneous and unreasonable view to take of the provisions of Order LIII. It is true that the action is one in which an injunction was claimed, but it is equally an action in which the plaintiff has recovered a sum not exceeding 10*l.*, and, that being so, in my opinion the plaintiff's costs ought to be taxed on the lower scale.

Appeal allowed.

Solicitors for plaintiff: *Ford & Ford, for Coombs, Worcester.*

Solicitors for defendant: *Church, Rendell & Co., for Dingle, Worcester.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1907
Nov. 4.

UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION.

THIS was an appeal from a decision of Channell J., whose judgment on two of the questions raised in the action is reported [1907] 1 K. B. 259. The sole question argued and decided on the appeal was one of fact, and the case, therefore, does not call for a report.

Scrutton, K.C., and *Adair Roche*, for the plaintiffs.
Atkin, K.C., and *M. Hill*, for the defendants.

THE COURT (Lord Alverstone C.J., Buckley and Kennedy L.JJ.) dismissed the appeal.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Goddard & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1907
July 27, 29, 31; *Nov.* 30.

GINGELL, SON & FOSKETT, LIMITED *v.* STEPNEY BOROUGH COUNCIL.

Market—Manorial Market—Extent of Franchise—New Streets—Dedication—Presumption.

There was in the parish of Whitechapel, which was included in the manor of Stepney, an ancient manorial market without metes and bounds, which was held in a street called High Street. There was evidence from which it might be inferred that the right to hold the market extended to holding it in streets adjoining High Street, when that street was overcrowded. Under an Act of Parliament passed in 1840 two new streets were made adjoining High Street on ground that included the sites of pre-existing streets which adjoined that street. Under an Act of Parliament passed in 1865 another new street, by which an existing street was connected with High Street, was made upon ground previously covered with houses. These streets were all in the parish of Whitechapel. The Acts under which they were respectively made provided that, when the streets were made, the

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ground laid open into them should form part of the streets, and should be used by the public accordingly. There was evidence that the streets so made had been for many years used for the purposes of the market without interference by the highway authority:—

Held by Vaughan Williams L.J. and Buckley L.J., that the right to hold the market extended to holding it in these streets, when High Street was overcrowded, and that the statutory dedication of them as highways must be taken to be subject to the user of them for the purposes of the market.

Fletcher Moulton L.J. dissented, on the ground that in his view the facts of the case did not justify the inference that there was a prescriptive right to hold the market in any other street than High Street, and that the statutory dedication of the new streets was absolute, and not subject to any right of using them for the purposes of the market.

APPEAL from the judgment of Swinfen Eady J. in an action tried by him without a jury. (1)

The plaintiffs were salesmen in the Whitechapel Hay and Straw Market, which was under the control of the defendants as successors to the trustees of the parish of St. Mary, Whitechapel, who were given control thereof by the Whitechapel Improvement Act, 1853 (16 & 17 Vict. c. cxli.).

It was admitted that this market, which was held on Tuesdays, Thursdays and Saturdays, was an ancient market belonging to the lord of the manor of Stepney, which included the whole of the parish of Whitechapel, and that the market was lawfully held in the High Street, Whitechapel. The dispute between the parties, in respect of which the action was brought, was whether the plaintiffs, who, together with other salesmen, had for many years placed their hay carts for the purposes of the market in three streets, called respectively Commercial Street, Leman Street, and Commercial Road, which streets adjoined High Street, as well as in High Street itself, where there was an admitted market, were entitled so to place them. The defendants had in fact received tolls payable in respect of such carts wherever standing, accounts of the tolls being rendered by the salesmen, without stating the position of the carts.

On or about May 11, 1904, the defendants, as successors to the trustees of the parish of St. Mary, Whitechapel, and the borough engineer and surveyor of pavements for the metropolitan

(1) [1906] 2 K. B. 468.

borough of Stepney, in the exercise of the powers respectively conferred upon them by the Whitechapel Improvement Act, 1853, and the Borough of Stepney (Whitechapel) Scheme, 1901, confirmed by an Order in Council of March 25, 1901, and the defendants, as a local authority executing the office of and being surveyors of highways within the meaning of the Metropolis Management Acts, by writing sealed with the common seal of the defendants, and signed by the said borough engineer and surveyor of pavements, jointly and severally made certain orders and directions for the regulation of the said market, intituled "Metropolitan Borough of Stepney—Parish of Whitechapel—Orders and Directions for the regulation of the Whitechapel Hay Market," and containing (inter alia) the following provisions: "1. No cart, waggon, or other vehicle, loaded with hay or straw brought into the parish of Whitechapel for sale on the usual market days, shall (except with the consent of the borough engineer and surveyor of pavements previously obtained) be placed or stand in any highway or street of the said parish, save and except the following, namely, (1.) the Whitechapel High Street; (2.) so much of the Commercial Road as extends from the Whitechapel High Street to Union Street; (3.) Buckle Street; (4.) so much of Colchester Street as extends from Leman Street to Plough Street; (5.) Plough Street; (6.) Goulston Street: Provided always that the highways or streets, or portions thereof, above mentioned, and numbered 2, 3, 4, 5, and 6, shall not be used or occupied for placing or standing carts, waggons, or other vehicles as aforesaid, until the space allocated for the purposes of the market in the Whitechapel High Street shall be fully utilized and occupied, or until such street shall have become impeded by reason of too many carts, waggons or other vehicles standing and being therein. (9.) The borough council and the said borough engineer and surveyor of pavements do hereby give notice that, in cases where the above orders and directions are not complied with, the penalties under the Acts of Parliament applicable hereto will be strictly enforced, and that the market regulator has been authorized and empowered to take any waggon, cart or other vehicle not placed or standing in compliance with such orders and directions to the Whitechapel Destructor

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Depot, George Yard, E." A copy of the said orders and directions under the borough council's common seal, and signed by the borough engineer and surveyor of pavements, together with a copy of a plan referred to in the said orders and regulations, was publicly affixed in a conspicuous part of the said High Street, and a like copy was also sent by registered post to each hay and straw salesman in the said borough accustomed to avail himself of the accommodation afforded by the market, including the plaintiffs.

A plan of the locus in quo is given in the report of the case in the Court below (1), to which the reader is referred.

On Saturday, May 27, 1905, the plaintiffs, with a view of testing their rights, placed three of their vans in Leman Street during market hours, at a time when High Street was full except a space opposite the plaintiffs' premises, which was necessarily kept vacant for access to their premises and as standing room for their salesmen. The defendants removed these vans.

The plaintiffs claimed (inter alia) :—

3. A declaration that they were entitled to place their hay and straw carts and vans (*a*) upon the western line of tramway (2) in Leman Street, between the north end of Leman Street and Great Alie Street and south of the cross-over tramways; (*b*) upon the western line of tramway in Commercial Street, between Wentworth Street and High Street, Whitechapel; and (*c*) in Commercial Road, all in the parish of Whitechapel, during the hours of the hay and straw market.

4. A declaration that, when there was not sufficient standing room in High Street, Whitechapel, for carts or waggons loaded with hay or straw intended to be sold in the said market, the plaintiffs were entitled to place such carts or waggons in one or more of the streets adjoining the said High Street, and that the defendants were not entitled to order such carts into Buckle Street, Colchester Street, and Plough Street, which did not adjoin the said High Street.

The origin of the market in question could not with certainty be

(1) [1906] 2 K. B. 468, at p. 470.

(2 See for explanation of this the provisions of the Tramway Acts hereinafter referred to.

traced to any charter or grant, and appeared to be really unknown. By a local Act (1) passed in the eleventh year of the reign of George III., intituled "An Act for the better paving of that part of the High Street in the parish of St. Mary Matfellon, otherwise Whitechapel, which lies in the county of Middlesex, and for removing obstructions and annoyances therein," commissioners were appointed for the purposes of the Act, and divers powers were given to them for those purposes, to which it is not necessary to refer in detail; and it was enacted that, during all such time as the new pavement should be carrying on and making in the said street, and until such new pavement should be completed, it should and might be lawful for the commissioners, or any five or more of them, to order and direct all and every such carts and waggons loaded with hay or straw as should be brought for sale into the said parish on the usual market days to be placed and stand in such of the streets or other places in the said parish and in such manner and form as the said commissioners, or any five or more of them, should direct and appoint; and that, when such pavement should be completed and finished, it should and might be lawful for the said commissioners, or any five or more of them, to order and direct all and every such carts and waggons loaded with hay or straw as should be brought into the said parish for sale on the usual market days to be placed and stand in or near the middle of the said street at such distances, and in such manner and form as the said commissioners, or any five or more of them, in writing under their hands, to be publicly affixed in some conspicuous part or parts of the said High Street, should from time to time direct and appoint. Certain penalties were by the Act imposed upon owners or drivers of carts or waggons who should disobey directions given by the commissioners as aforesaid. Provision was made by the Act for the making of certain rates or assessments by the commissioners upon the persons occupying houses and other tenements in the High Street, in order to defray the expenses of carrying the Act into execution; and it was provided that no person should be liable to be rated or pay more than five sixth parts of such rate or assessment, rates or assessments,

(1) The clauses of this Act were not distinguished by numbers.

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in respect of any house or tenement situate on the south side of the said street between Red Lion Street and the liberty of the City of London; and that the proprietors and occupiers of any such house or other tenement should be absolutely acquitted from any claim that might or could arise in respect of the appropriation of any toll or tolls on hay theretofore received by them or any of them. By another provision of the Act it was enacted as follows: After reciting that "there is due and has been accustomed to be received, for every cart or waggon loaded with hay brought into the said parish, and sold on the usual market days, the sum of sixpence, twopence whereof is due and of right belonging to the lord of the manor of Stepney in the county of Middlesex, as proprietor of the said market, and has accordingly from time to time been paid to and received by him, and the further sum of twopence, other part of the said sum of sixpence, is due and of right belonging to the said parish, for the cleansing and taking away the dirt and filth occasioned by such carts and waggons, and has been paid to and received by the several householders and inhabitants before whose doors such carts and waggons have stood, and been sold on the usual market days as aforesaid, for the use of the said parish, and the further sum of twopence, the remainder of the said sum of sixpence, is due and has been received by the said several householders and inhabitants against whose doors the said hay so exposed to sale stood," it was enacted that "to the end therefore that the useful purposes of this Act may be the better and more speedily carried into execution, and for and towards increasing the fund for defraying the charges of the same," there should after the passing of the Act be paid to receivers, to be appointed by the Commissioners, for every cart or waggon loaded with hay which should be brought into the said parish for sale on the usual market days and exposed for sale, the aforesaid sum of sixpence in lieu of all other tolls which were then authorized to be collected, the said receivers paying thereout to the lord of the said manor, or such other person as should be owner or proprietor of the said market for the time being, the sum of twopence, clear of all charges and expenses, for every cart or waggon loaded with hay which should be brought into the said parish and sold or

exposed for sale on the usual market days as aforesaid. It was further provided by the Act that, "whereas the keeping open the Hay-Market in the High Street in the parish of St. Mary Matfellon, otherwise Whitechapel, to such late hours has been found very inconvenient, not only to the farmers and consumers of hay and straw, but likewise to all passengers who have occasion to pass through the said High Street, and some further regulation is likewise necessary with respect to the said Hay-Market; be it therefore enacted by the authority aforesaid, that, from and after the passing this Act, so much of the above recited Act (1) as directs the time when the Hay-Market held in the said High Street shall end, and the standing of waggons, carts, or cars in the said market, be, and the same is hereby repealed; and that for the future the said market shall be held from Lady Day to Michaelmas from seven in the morning till one of the clock in the afternoon; and from Michaelmas to Lady Day from eight in the morning till twelve of the clock at noon, and at no other time or times; and, if any person or persons shall, at any other time, continue or suffer his or their waggon, wain, cart, or car, laden with hay, straw, or fodder, to stand or be in any part or parts of the said High Street, or Hay-Market, otherwise than as above mentioned, every such person shall for every such offence forfeit and pay the sum of five shillings, to be recovered and applied in such manner as by the said recited Act the penalties for offending against the said Act are to be recovered and applied."

The above-mentioned Act was repealed by the Whitechapel Improvement Act, 1853 (16 & 17 Vict. c. cxli.), by which provision was made for (inter alia) the better paving, repairing, lighting, cleansing, watering, and regulating such parts of the parish of St. Mary, Whitechapel, as were not within the liberties of the Tower and the City of London, and removing nuisances therein. By that Act trustees were incorporated for the purposes of the Act under the name of "the trustees of the parish of St. Mary, Whitechapel." By s. 43 the before-mentioned sixpenny toll was to be continued, and was to be received by a receiver appointed

(1) This was an Act of 31 Geo. 2, containing a general provision as to the hours within which hay markets in the metropolis might be held.

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by the trustees, who was to pay thereout twopence to the lord of the manor as before, and the remainder, after deducting a certain amount for the expenses of collection, was to be divided into two equal parts, one of which was to be applied in reduction of the annual paving rate to be assessed under the Act on the occupiers of rateable property in High Street, and the other was to be retained by the trustees for the use of the parish, and be applied in aid of the paving rate and expenses incident thereto. Sect. 46 provided that, during all such times as any new pavement or any public works should be carrying on in the High Street where the said hay market had been "usually" held, and until completion thereof, the trustees might order the hay carts to stand in other streets, and, when such paving and work should be completed and finished, they might direct them to be placed and stand in or near the middle of such street at such distances and in such manner and form as the said trustees might by writing under their common seal, to be publicly affixed in some conspicuous part or parts of the said street, direct and appoint; and it was further provided that, in case at any time they, or their surveyor, should consider the thoroughfare of the High Street to be impeded by reason of too many hay carts standing therein, their surveyor might order so many thereof as he might think expedient to be placed and stand in such of the streets and other places adjoining the High Street as to him might seem convenient for the purpose, and a penalty was imposed for non-compliance with such orders.

It appeared that Commercial Street and Leman Street, two of the streets in respect of which the action was brought, were made by the Commissioners of Woods and Forests under the powers of the Metropolis Improvement (Additional Thoroughfares) Act, 1840 (3 & 4 Vict. c. 87), which provided for the making of a number of thoroughfares in the metropolis as specified in the schedule thereto. None of the land taken to form those streets belonged to the lord of the manor. Commercial Street included the site of a previously existing street or alley called Essex Street, which was entered by an archway from High Street, with only a ten-feet entrance. A portion of Leman Street included the site of a previously existing street called Red Lion Street, which

communicated with the High Street. This also appeared to have been a very narrow street. By s. 20 of the above-mentioned Act of 1840 it was provided that, "when the said streets shall be made in pursuance of this Act, all the ground, land, and hereditaments which shall be laid open into the said streets, and paved as aforesaid, shall form part of the said streets, and shall be used by the public accordingly; and the same, and the sole power and authority of paving, repairing, cleansing, lighting, and watching thereof, and of rating the lands, tenements, and hereditaments situate and being within the same, shall be under the care, management, control, and jurisdiction of the same parishes, or places, or commissioners as possess such power and authority in respect of the sites of such streets, or any part thereof, at the time of the passing of this Act, or as the other streets and ways in the parishes or places in which the same respectively shall be situate." Commercial Road formerly only came from the east as far as Church Lane. In 1870 it was extended to High Street by the Metropolitan Board of Works under the powers of the Whitechapel and Holborn Improvement Act, 1865 (28 & 29 Vict. c. iii.), s. 16 of which provides that, "when the new streets and improvement respectively shall be completed, all the land which shall be laid open into the street, and paved as aforesaid, shall form part of the street and shall be used by the public accordingly, and the same and the sole power and authority of paving, repairing, cleansing, and lighting thereof shall be under the care, management, control, and jurisdiction of the Board of Works or vestry of the parish or place in which the same is situate." The part of Commercial Road adjacent to High Street made under the above-mentioned Act of 1865 appeared not to have been made upon the site of any existing street, but upon the site of previously existing houses, and yards of houses, belonging to private persons, which had been acquired for the purpose of making the street.

Certain special Acts of Parliament, obtained by the North Metropolitan Tramways Company and the Metropolitan and Metropolitan District Railway Companies, respectively contained provisions for the protection of the market: see the report of

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the case in the Court below. (1) The North Metropolitan Tramways Act, 1887 (50 & 51 Vict. c. xii.), s. 9, provided that, for the protection of the Whitechapel Hay and Straw Market, and the hay and straw salesmen, the tramway to be constructed under the Act in Commercial Street between Wentworth Street and High Street should be constructed as a double line with cross-overs to admit of shunting, and that the salesmen should "as against the company" be entitled to occupy the west line in market hours, but the section was not to abridge the rights of the Board of Works for the Whitechapel district. The 10th section of the North Metropolitan Tramways Order, 1888, confirmed by the Tramways Orders Confirmation (No. 3) Act, 1888 (51 & 52 Vict. c. cxxii.), contained a similar provision for the protection of the hay salesmen in Leman Street as far as Great Alie Street.

There was evidence with regard to the user of the streets in question for the purposes of the market, the nature of which appears from the judgment of Swinfen Eady J. in the Court below (2), and the effect of which is discussed in the judgments of the Lords Justices in the Court of Appeal.

Swinfen Eady J. gave judgment for the plaintiffs, and made a declaration as prayed for in paragraphs 3 and 4 of the statement of claim. (3)

July 27, 29. *Macmorran, K.C.*, and *Courthope-Munroe*, for the defendants. It may be that the presumption is that, as held by Swinfen Eady J., this was a market granted without metes and bounds to the lord of the manor; but, assuming that to be so, the grant of such a market would not entitle the owner of the market to hold it anywhere he pleased in the manor—for instance, in alieno solo against the owner's will—but only on land belonging to himself, or of which he could procure the lawful use for the purposes of the market. The King clearly could not grant a right to hold a market on land not the property of the owner of the market without the consent of the owner of that land, and it is submitted, upon the authorities, that he could not grant a right to hold a market on a highway already absolutely dedicated to

(1) [1906] 2 K. B. 468, at p. 473. (2) [1906] 2 K. B. 468, at pp. 482-4.
(3) [1906] 2 K. B. 468, at p. 476.

the public. There may no doubt be cases where there is evidence from which an immemorial user of a highway for the purpose of holding a market on it may be presumed, and there may be other cases in which for sufficient reasons it may be presumed that a highway was originally dedicated to the public subject to its user for the purposes of a market: see *Elwood* v. *Bullock* (1); *Attorney-General* v. *Horner* (2), and the authorities in that case referred to. In the present case, however, there is no evidence from which it can properly be inferred that there was any right, immemorial or otherwise, to hold this market in any street other than High Street. There is no evidence of any user whatever of adjoining streets for the purposes of the market prior to 1854, and any user proved to have taken place subsequently may be referred to the express power given to the trustees under the Act of 1853 to order hay carts to stand in adjoining streets, when repaving of the High Street was going on or when the High Street was overcrowded. The inference to be drawn from the provisions of the Acts of 1770 and 1853 is that the market was one which was previously to 1770 held in High Street only, though the Acts respectively gave power to the authorities constituted by them, while the paving of High Street was going on, or when High Street was too crowded with market carts, to order the hay carts to stand in other streets. No presumption of an immemorial user of the adjoining streets for the purposes of the market can arise from the user of them for those purposes since 1853. The dedication of the new streets as highways under the Acts in pursuance of which they were made is in terms absolute; and there are no circumstances such as can justify the Court in reading that dedication as subject to any right of user for the purposes of a market, there being no substantial evidence that the market franchise ever extended to streets adjacent to High Street. Such user of the new streets in question for the purposes of the market as may have taken place since their formation may be accounted for as having taken place with the acquiescence of the street authority, and cannot possibly be made the basis of a presumption of any grant of a right so to use those streets.

(1) (1844) 6 Q. B. 383.
(2) (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66.

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The entrance to Essex Street, the site of which now forms part of Commercial Street, appears to have been so narrow that a cart could not have got through it into High Street. Red Lion Street, the site of which now forms part of Leman Street, appears also to have been too narrow for market purposes. The part of Commercial Road which leads into High Street was not previously to 1865 a street at all, but the sites of private houses, and there could have been no ancient user of it for market purposes. Assuming that the franchise granted to the lord of the manor extended to the whole parish as being a franchise for a market without metes and bounds, it would be necessary for the plaintiffs' case to presume that the sites of the new streets had belonged to the lord of the manor, and that those streets were dedicated subject to the franchise, neither of which hypotheses is consistent with the known facts with regard to the circumstances under which the streets were made. In the cases of Commercial Street and Leman Street, their sites, so far as not coincident with those of Essex Street and Red Lion Street, were purchased from private owners, as appears from the schedule to the Act of 1840, and in the case of Commercial Road, though there is no ownership schedule to the Act of 1865, the same was presumably the case, the ground having been covered with houses. The provisions of the tramway Acts, which were relied on by the plaintiffs in the Court below, are in substance merely statutory contracts between the companies and the salesmen, which give the latter certain rights as against the former, but none as against the public. It may be that the regulations made by the defendants as controllers of the market cannot be supported under the Act of 1853, but the question really is whether the plaintiffs can obstruct the streets in question with their carts against the will of the defendants as highway authority. Unless those streets form part of the market, the defendants are clearly entitled to remove the plaintiffs' carts as obstructions, either as surveyors of highways under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 20), s. 96, or under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), s. 65.

Avory, K.C., and *Frampton*, for the plaintiffs. It being now

admitted that this is a market franchise, not limited by metes and bounds, but extending to the whole parish, it follows that the lord of the manor was entitled to hold the market in any place in the parish where he could do so without infringing the rights of others. The only question really is whether or not the dedication of the streets in question under the Acts of 1840 and 1865 must be taken to exclude any right to hold the market in those streets, or to be subject to the user of them for the purposes of the market. The evidence shews that from a period dating back to 1854 there has been user of streets adjoining High Street for the purposes of the market; and the report of a committee presented to the Whitechapel Board of Works in the year 1878 shews that in that year all the streets in question were being used for those purposes. Such user was never objected to or interfered with by the street authorities until 1904, and a legal origin ought, if possible, to be presumed for it. It was said by Lord Tenterden C.J. in *Mosley* v. *Walker* (1) that formerly all markets were held in the public streets. In *Attorney-General* v. *Horner* (2) Brett M.R. seems to have thought that the Crown could grant a franchise to hold a market in a street already dedicated to the public; but, assuming that not to be so, there are amply sufficient grounds in this case for presuming that the dedication of the streets in question under the statutes in pursuance of which they were made was subject to the user of them for market purposes. The proper inference from the Acts of 1770 and 1853 is that the market was from time immemorial one which might be held in High Street or adjoining streets—"in sive juxta" High Street; and, if so, the presumption should be that the statutory dedication of the new streets was subject to the right of holding the market in them: see *Attorney-General* v. *Horner* (2); *Goldsmid* v. *Great Eastern Ry. Co.* (3) The express power given in the Acts of 1770 and 1853 to order the hay carts to be placed in streets other than High Street does not shew that the market did not originally extend to adjoining streets; for it was necessary in order to enable the authority to prevent carts from using High Street for market purposes

(1) (1827) 7 B. & C. 40, at p. 52.
(2) 14 Q. B. D. 245, at p. 258.
(3) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.

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during paving operations, and to regulate the position of the carts in that street, and to prevent carts standing there when it was overcrowded. The North Metropolitan Tramways Act, 1887, and the North Metropolitan Tramways Order, 1888, amount to a legislative recognition of the right of the salesmen to use Commercial Street and Leman Street for market purposes, and form some, though perhaps not conclusive, evidence that the market rights extend to those streets. Commercial Street and Leman Street respectively occupy the sites of old streets adjoining High Street, and, even if those streets were too narrow for carts as alleged, trusses of hay might be carried to and from High Street through them in barrows or on men's backs. Commercial Road stands no doubt on a somewhat different footing as being an entirely new street, but it is submitted that really the same considerations apply, and the reasonable presumption is that it too was dedicated subject to the right of user for the purposes of the market. [They also cited *Curwen* v. *Salkeld.* (1)]

Macmorran, K.C., for the defendants, in reply.

Cur. adv. vult.

July 31. VAUGHAN WILLIAMS L.J. I think that the judgment of Swinfen Eady J. in favour of the plaintiffs was quite right, and ought, subject to a small variation of the declaration contained in his order, to be affirmed.

It is now conceded, not only that the market is an ancient market, but that it is a market without metes and bounds, and that the area of the market franchise extends to the whole parish within the manor; and, in my judgment, the evidence shews that the market, although held in High Street, Whitechapel, has always, on days on which High Street has been overcrowded with hay carts, overflowed into the streets adjoining High Street, and that space appropriated to the market has extended to such streets, and that this has been done by the order, or with the acquiescence, of the local authority for the time being. In particular it was proved that for very many years the plaintiffs and other salesmen have placed their hay carts in Commercial Street, Leman Street, and Commercial Road East, as well as in

(1) (1803) 3 East, 538.

High Street, and the defendants have in fact received tolls in respect of those carts wherever standing, accounts of tolls payable being rendered by the salesmen without stating the position of the carts.

This being the state of the evidence, the only question remaining for discussion is whether this user of these streets for holding the market can constitute a legal right to hold such market in streets constructed under statutes as public highways.

It is said, and of course rightly, that the market franchise cannot give the grantee a right to hold a market on land other than that belonging to him, unless the owner of such land consents. He may consent by a licence, or he may dedicate land as a highway or he may sell the land to the grantee of the franchise; but it is said that, where a street has been constructed under a statute as a highway, there is no one who can in any way consent to the land on which the highway is being dealt with otherwise than as a highway in accordance with the statute. That is true. But what is the construction of the statute? It is convenient at this point that I should read the words of s. 20 of the Act of 1840, 3 & 4 Vict. c. 87. That is a statute which provides, amongst other things, for creating new and commodious thoroughfares. Then follows a list of the various thoroughfares to be created, and one of them is a thoroughfare between the populous neighbourhood of Whitechapel and Spitalfields. Then s. 20 provides that, "when the said streets shall be made in pursuance of this Act, all the ground, land, and hereditaments which shall be laid open into the said streets, and paved as aforesaid, shall form part of the said streets and shall be used by the public accordingly; and the same and the sole power and authority of paving, repairing, cleansing, lighting, and watching thereof, and of rating the lands, tenements, and hereditaments, situate and being within the same, shall be under the care, management, control, and jurisdiction of the same parishes, or places, or commissioners as possess such power and authority in respect of the sites of such streets, or any part thereof, at the time of the passing of this Act, or as the other streets and ways in the parishes or places in which the same respectively shall be situate."

It cannot reasonably be argued that, upon its true construction,

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the statute intended to deprive without compensation the grantee of the market, or others, of rights already acquired before the passing of the statute. This disposes of the case of Leman Street and any other street as to which the evidence of its user for market purposes is such that a legal origin for the right of such user must be presumed. In such a case in my judgment the widening or lengthening or diversion of such a highway adjoining to, or ending in the High Street hay market, would not affect or take away the right of holding the market in the street as altered.

Then, with reference to the case of a new highway adjoining the High Street hay market, constructed on land previously covered with houses and where there had been no highway before its construction, but on which highway a market has been held for years either by the order of, or without objection by a highway authority having the right and duty to object if such user were wrongful, in such a case in my opinion one ought to attribute the user, if possible, to a legal origin; and I think this can be done on the principles acted on by Lord Esher in his judgment in *Attorney-General* v. *Horner* (1), where he was dealing with the user of public streets alleged to be in contravention of the provisions of a paving Act, which was relied on as enabling the local authority to remove the obstruction caused by selling fruit and vegetables under the licence of the grantee of the market. I should like to refer to two passages in his judgment, which appear to me to bear on questions raised in this appeal. After saying that the real inference to be drawn with regard to certain streets was that "the people who dedicated those streets took into account the fact of the market and dedicated the streets subject to the market rights over them," he said (2): "It was, however, urged, and very strongly, on the part of the plaintiff that the result of the Paving Acts of George III. was to interfere with and take away the rights of the owner of the market franchise. Now it is to be observed that, if those Acts have taken away and interfered with such rights, they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering

(1) 14 Q. B. D. 245, at pp. 256-8. (2) Ibid. at p. 256.

with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but, if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so. Can one then give a reasonable construction to these Acts without coming to the injurious supposition which has been contended for?" Then further on he says (1): "If that"—i.e., the construction he was putting on the terms of the particular charter—"be true, it is not necessary to give any decision upon the point whether the Crown could grant the franchise of a market to be held in public streets existing before the grant, or in streets which are not dedicated subject to the franchise. I for myself, however, give no countenance to the supposed doctrine that the Crown could not grant validly a franchise for the public good to hold a market in the public streets, for I think it might be well argued that the common law has entrusted to the King the exercise of such prerogative for the benefit of the public, making the Crown, after an inquiry, the sole judge of whether it is for the benefit of the public to grant the franchise or not." I wish in this connection also to refer to a passage in the judgment of Cotton L.J. in *Goldsmid* v. *Great Eastern Ry. Co.* (2) He there said: "In a passage which I read the other day from Lord Tenterden, it was said in a former time that formerly all markets were holden in the public streets. Of course, without a franchise authorizing it, that would have been treated as a nuisance and illegal; but, when there was a franchise granted for holding a market, what was done for the purpose of exercising the franchise which had been granted by the Crown, was considered as a reasonable use of the street—of the public thoroughfare. As I understand those Acts"—i.e., the Paving Acts—"they were not intended in any way to make that illegal which was not illegal before, but simply to give to those in whom power was vested by these paving Acts, a summary means, and providing a summary penalty, for preventing those who, without lawful reason and without lawful excuse, were doing those acts in the streets which

(1) 14 Q. B. D. 245, at p. 258. (2) 25 Ch. D. 511, at p. 544.

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were prohibited: so that, in my opinion, that left the rights of the plaintiffs as they were before those Acts. It left them at liberty to carry on their franchise, even although they might be in some of the streets within the jurisdiction given to the Commissioners by those Acts." Cotton L.J., in giving his judgment in the case of *Attorney-General* v. *Horner* (1), refers to that passage in his judgment in the case which I have just cited, and says that he adheres to the view that the holding of a market in a public street by virtue of a franchise granted by the King is not a nuisance in the street, even though without the franchise it would be a nuisance.

In my opinion this appeal should be dismissed, subject, however, as I have said, to a slight variation of the declaration made by the order, which must be dealt with hereafter.

FLETCHER MOULTON L.J. The general law which we have to apply in this case does not seem to me to be much in dispute. If a market is granted to the owner of a manor with respect to goods coming within that manor, prima facie he has the power to change the place within that manor where the market is held, unless it is a market granted with metes and bounds; but, in the absence of prescription, he is only entitled to hold the market on land which is his own, or which he can lawfully procure to be used for that purpose. There is no general right to hold markets in public streets, although there are many markets which, by prescription, are held in public streets. It has been a disputed point in the Courts whether or not the right to hold a market in a particular public street could be lawfully granted, if the date of the grant of the market was subsequent to the dedication of that street to the public as a highway. It was held in *Attorney-General* v. *Horner* (2) that the streets there in question must be presumed to have been dedicated subject to the grant of the market, so that the point did not arise; but there is a dictum of Brett M.R. (3) in that case which suggests that the Crown might grant the right to hold a market in a street, even if it had already been dedicated to the public. Lindley L.J. (4),

(1) 14 Q. B. D. 245, at p. 262.
(2) 14 Q. B. D. 245; 11 App. Cas. 66.
(3) 14 Q. B. D. at p. 258.
(4) Ibid. at p. 264.

however, carefully guarded himself from being supposed to accept that suggestion as representing the law on the subject. In my opinion that question does not arise here. No grant is relied on by either party. If a market in fact exists, which it has been the practice from time immemorial to hold in a particular public street, the law will no doubt presume a lawful origin for that practice. But I cannot find any trace of a doctrine that a market can be granted for a manor or any other area with a general right of holding it anywhere in the public streets in that area, just as the owner of the market may think fit, or that any such rights have ever even been alleged, much less supported in legal proceedings, either on the basis of prescription or grant. It appears to me that such a doctrine is opposed to the fundamental principles of the law with regard to markets and to all the relevant decisions of the Courts. If a right to hold a market in a particular street is claimed, it must be shewn that the privilege has been enjoyed from time immemorial, or that there has been a grant of the right to hold it in that street before, or, if the dictum of Brett M.R. to which I have alluded is correct, after the dedication of that street to the public. But I can find no countenance for the notion that there could be by prescription or grant a right to use any of the streets in an area such as a parish or manor for the purpose of a market at the will of the owner of the market.

In the present case we have unquestionably an ancient market for hay, which it has been the practice from time immemorial to hold in High Street, Whitechapel. The defendants' counsel has not troubled himself to inquire whether the privilege of holding that market in High Street is limited to a particular part of that street, or extends to the whole of it. Nor has he troubled himself to dispute that the market here in question is a manor market, i.e., a market for all such goods coming within the manor on market days for sale, and that, such a market being granted to the owner of the manor, he was entitled, if he chose, to alter its position. He might have chosen to hold the market on any land within the manor belonging to himself, or which he had lawfully procured for the purpose of holding it. These are facts which, for the

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purposes of this appeal, we may take as being common to both sides. But the plaintiffs set up a right to hold the market, not only in High Street, but, so far as I can understand the case put forward, in any public street within the parish of Whitechapel. There is, no doubt, a right to take toll on all hay coming into the parish on the usual market days and sold therein. But that is immaterial to the question which we have to decide. There is no sort of identity between what I may call the "toll-limits" of a market and the limits of the land on which it is held, or on which there is a right to hold it. The former must necessarily include land belonging to other people as well as public streets and public places. The latter may be a definite plot of land belonging to the owner of the market or forming part of a public street. In this case the toll-limits are the parish of Whitechapel, and the duty to pay toll applies to all hay coming within such parish on usual market days, and sold therein, whether sold in the market or not. The question here is not as to toll limits, but as to where the market can be held, i.e., whether the owner of the market has a right to use any public street within the parish which he may choose for the purpose of holding this market. As I have said, I doubt whether any such claim has ever before been advanced. If it be advanced, it must be supported by grant, of which there is no question here, or by prescription; and I am satisfied that no such claim can be supported.

In order, however, not to make the question rest merely on an opinion with regard to a point of law as to markets, I have examined very carefully all the materials before the Court to ascertain what this market is and always has been.

Both the parties content themselves with commencing with the Act of 1770 relating to this market. It is an Act which throws the strongest light upon the nature of this market, being an Act for regulating the street in which the market was held at that time, which it does in a very drastic manner. References are constantly made therein to the market, and, in my opinion, it is impossible to read this Act without seeing that the market was at that date held in High Street, and nowhere else. I will only refer to one or two passages in the Act, though

the whole of it is instructive for the purposes of the present question. I will refer first to a passage which runs as follows: "And whereas the keeping open the Hay-Market in the High Street in the parish of St. Mary Matfellon, otherwise Whitechapel, to such late hours has been found very inconvenient, not only to the farmers and consumers of hay and straw, but likewise to all passengers who have occasion to pass through the said High Street, and some further regulation is likewise necessary with respect to the said Hay-Market, be it therefore enacted by the authority aforesaid, that, from and after the passing of this Act, so much of the above recited Act"—that is, an earlier Act to which neither party has referred—"as directs the time when the Hay-Market held in the said High Street shall end, and the standing of waggons, carts, or cars in the said market, be, and the same is hereby repealed." Then other provisions with regard to the hours for holding the market are substituted, and penalties are imposed on any person or persons who shall continue or suffer his or their waggon, wain, cart, or car, laden with hay, straw, or fodder, "to stand or be in any part or parts of the said High Street or Hay-Market, otherwise than as above mentioned," shewing that the two expressions "High Street" and "Hay-Market" were used as synonymous at that date. There are other provisions in the Act which appear to me to shew that the market must at that time have been held in High Street only. I do not wish to lengthen my judgment by referring to all of them, but I will refer to one which is very interesting in this connection, because the bearing of it is indirect, and its full meaning is best appreciated by reference to the subsequent legislation with regard to this market. It recites that the sum of sixpence per cartload had been payable theretofore by way of toll in respect of all hay brought into the parish and sold on usual market days, of which twopence was payable to the lord of the manor of Stepney as owner of the market, twopence to the persons who had to clean up the dirt occasioned by the carts and waggons, and the remaining twopence to the householders before whose doors the hay so exposed for sale stood. That state of things was altered by the Act which created the commissioners, who were to have the duty of

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regulating the market, and also repaving the High Street in which it was held, and who were in future to have the right of receiving the toll of sixpence. Out of that sixpence the lord of the manor was still to receive twopence, shewing that there was no intention to interfere with his rights, but the commissioners were to keep the rest. This would naturally be so with regard to the second twopence, because they were the persons who were to attend to the street; but they were also to keep the remaining twopence, which formerly went to the persons before whose doors the carts used to stand. We find that the commissioners were empowered by the Act to levy a rate on the occupiers of premises in the High Street for the purposes of the street, but the Act provided that the persons who occupied premises on the south side of that street within certain limits were to have their rates reduced; obviously, in my opinion, because they were the persons before whose doors the carts used to stand, and who used to receive twopence out of the toll for that reason. There is no reference in this connection to occupiers in any other portion of the parish, and yet the tolls which were then given to the commissioners were general tolls in respect of every cartload of hay that came into the parish on the usual market days. This seems to me to shew clearly that the only place where these hay carts used to stand was in the High Street. So that to my mind, both by its silence and by its provisions, this Act makes it practically certain that at the date when it was passed there was only, so far as the public streets were concerned, the right to hold the market in High Street.

But, in addition to this, important operative provisions in the Act, which were continued in a modified form by the provisions of a later Act, namely, the Act of 1853 (which latter provisions are still in force), shew, in my opinion, that, even if there had been at one time a general market in the public streets, there was thenceforth to be such a market no longer. One passage in the Act of 1770 provides as follows: "And be it further enacted by the authority aforesaid that, during all such time as the new pavement"—that is, the repaving of High Street—"shall be carrying on and making in the said street, and until such new

pavement shall be completed, it shall and may be lawful to and for the said commissioners, or any five or more of them, to order and direct all and every such carts and waggons loaded with hay or straw as shall be brought for sale into the said parish on the usual market days to be placed and stand in such of the streets or other places in the said parish, and in such manner and form as the said commissioners, or any five or more of them, shall from time to time direct and appoint." Therefore during the repaving contemplated by the Act these carts might use any street in the parish that the commissioners might appoint. The Act then proceeds—"and that, when such pavement shall be completed and finished, it shall and may be lawful to and for the said commissioners, or any five or more of them, to order and direct all and every such carts and waggons loaded with hay or straw as shall be brought into the said parish for sale on the usual market days to be placed and stand in or near the middle of the said street, at such distances and in such manner and form as the said commissioners, or any five or more of them, by writing under their hands to be publicly affixed in some conspicuous part or parts of the said High Street shall, from time to time, direct and appoint." In other words, the provision was that, after the repaving was done, the commissioners might, by regulations, direct that all such carts should stand, not in the High Street only—that, I think, would have been unnecessary—but in such places only in the High Street as they should direct. From and after that time, as it appears to me, even if there had been before power in the lord of the manor to use other streets for the purposes of the market, there was power so to use them no longer, because the commissioners had a right to say that the whole of the carts should range themselves in such places in the High Street as they might by notice appoint. These provisions, however, influence my mind, not so much as having the effect of taking away any general right of holding the market in any street, if such existed before, but because, having regard to the tendency of our legislation in favour of existing rights, they convince me that there was no right, even claimed, at that time to hold this market elsewhere than in High Street, and that by making these

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provisions the Legislature was merely giving to these commissioners the power of regulating for the purposes of public order the market as it actually did exist, namely, as a market in High Street. In this way these provisions afford important, and to my mind overwhelming, evidence that it was only a market in High Street which then existed. I need not add that, if the right to hold the market in any other street did not exist at that date, it could not be acquired afterwards.

That state of things seems to have gone on from 1770 to 1853, in which latter year by the Act 16 & 17 Vict. c. cxli. there was a transfer of the powers given to the commissioners by the Act with which I have been dealing to trustees incorporated under the name of the "Trustees of the parish of St. Mary, Whitechapel" (of whom the defendants are successors), and further provisions were made with regard to the same market. The Act of 1853 proceeds to a certain extent on the lines of the former Act, but in some respects it varies the provisions of that Act; and the manner in which it varies them, in my opinion, greatly strengthens the conclusions to which I have come. Let me take, by way of example, the way in which it deals with the question of toll. The new trustees are to receive the sum of sixpence per cartload by way of toll, and to pay the twopence out of it to the lord of the manor, as before; and they are, as before, to keep the remainder; but they are to deal with it in the following way: they are to divide it into two equal parts, of which one is to be applied in reduction of the annual paving rate to be assessed on the occupiers of premises in the High Street, and the other is to be retained by the trustees for the use of the parish. Therefore the persons who were regarded by the Act as having been specially interested in, and having an equitable right to be considered in the disposition of, the toll upon carts coming into the parish, which were subject to tolls by reason of the existence of the market, were the persons occupying premises in the High Street; and there is no reference to persons occupying premises in any other street. I now pass to the clause in the Act of 1853, which corresponds to the regulations made by the Act of 1770 with regard to the conduct of the market, and to the powers exercisable by the

trustees in relation thereto. This is clause 46. That clause gives to the trustees very much the same powers as were given to the commissioners under the former Act with one exception. It provides that, "when such paving and work shall be completed and finished, it shall be lawful for the said trustees to order and direct all and every such carts and waggons loaded with hay or straw to be brought into the said parish for sale on the usual market days to be placed and stand in or near the middle of such street at such distances and in such manner and form as the said trustees by writing under their common seal to be publicly affixed in some conspicuous part or parts of the said street shall from time to time direct and appoint." So that, as before, the Act gives the trustees power to order all these tollable carts to stand in such places in the High Street as they may by notice direct. But it gives them an additional power to which the whole of the facts of user upon which the plaintiffs rely are in my opinion attributable. This is the new power: "Provided always that in case it shall be considered at any time or times by the trustees, or their surveyor of pavements, that the thoroughfare of the said High Street is impeded by reason of too many carts and waggons loaded with hay and straw standing and being therein, then and upon every such occasion it shall be lawful for the said surveyor of the said trustees to order and direct such of the said carts and waggons loaded with hay and straw as he shall think expedient to be placed and stand in such of the streets and other places adjoining the said High Street as to him shall seem convenient for the purpose." Therefore, when the market had got into the hands of a public body, and the lord of the manor's rights only extended to the receipt of twopence of the toll, and his duties with regard to the provision of a place for the market had probably ceased, the Legislature gave to the trustees the power, when the High Street was overcrowded, of using adjoining streets for the purpose of standing carts and waggons loaded with hay and straw in them, so as to relieve the High Street. That was in the year 1853.

What is to me the most impressive in this case is that there is no evidence of any user of any adjoining street for the purposes of this market which goes back earlier than the date of this last-

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mentioned power being given to the trustees. The earliest evidence is that given by Uriah Harvey on commission. He says: "I was familiar with the district from 1854 onwards. In 1854 the market carts stood in the High Street, and at times one or two in Colchester Street. The market was slack at the time. I think I have seen a few in Leman Street, but I cannot be sure about their being there at that date. I did not see any in Commercial Street. That was a narrow street then. There was nothing in 1854 in any other street, or for years afterwards. I was in the district till 1864." Therefore this evidence (which was called on behalf of the plaintiffs) shews that in 1854, when this power of the trustees had come into existence, there was only a small user of the adjoining streets, quite insufficient, I think, to justify any presumption of there having been any right to hold a market there. There seems to me to be no reason to doubt that the trustees were at that time exercising the powers given to them under the Act of 1853, and that such user as there may have been of adjoining streets for the purposes of the market was referable to those powers. This state of things continued for some years. As time went on, and the neighbourhood developed, we find that the adjoining streets were more largely used for the purposes of the market. But, with regard to what took place after 1853, one is then dealing with modern times in London. I cannot under the circumstances infer the existence of a prescriptive right dating from time immemorial, when all the evidence of user is of so late a date. I can find no evidence of any user whatever for the purposes of this market of any street other than High Street prior to the date of these powers being given to the trustees by the Act of 1853, which entitled them to use these adjoining streets for the purpose of the market when they considered that the High Street was too crowded; and on the other side I find all evidence as to user in earlier times points to the market being in High Street only.

I must now refer to a few facts with regard to the history of the neighbourhood during this period, and the formation of the new streets now in question adjoining the High Street. In 1840 an Act was passed for the making, among others, of a new

thoroughfare between Whitechapel and Spitalfields on the one hand, and the docks and wharves of the river Thames on the other, by widening the northern and southern extremities of what is now Leman Street, and by creating a new street from the northern side of Whitechapel to the front of Spitalfields Church. Part of this thoroughfare is the new street called Commercial Street. The portion of street to the south of the High Street, which had previously formed Red Lion Street, was then enlarged, and is now known as Leman Street. I think that the streets in question must have been made within the next ten years from the passing of the Act of 1840. These streets were made by the Commissioners of Woods and Forests on behalf of the public, and the dedication of them is statutory, and is to be found in s. 20 of the Act, which enacts that "when the said streets shall be made in pursuance of this Act, all the ground, land, and hereditaments which shall be laid open into the said streets and paved as aforesaid, shall form part of the said streets, and shall be used by the public accordingly." In my opinion that provision left no power in anybody to vary the statutory dedication, which I unhesitatingly regard as an absolute dedication. These streets, with the exception of the parts of Leman Street and Commercial Street which originally formed the sites of the narrow streets Red Lion Street and Essex Street, and as to which there is no evidence that they were ever used for the market, were made on new ground over which there could have been no right of holding a market; and, in my opinion, there was an absolute statutory dedication of them as highways, free from any right or franchise or anything of the kind, to the public, and therefore these streets never became subject to any market rights at all. They would, I should suppose, be subject to the statutory right, which the trustees possessed with regard to all streets adjoining the High Street, of using such streets for the purposes of the market when the High Street was overcrowded, but otherwise they would be just like any ordinary street in London.

The next material event was that, under an Act passed in 1865, a totally new street communicating with the High Street was made over ground which had not been dedicated to the public

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for any purpose, and which had previously been covered by houses. That is the street known as Commercial Road. There is a similar dedication clause in the Act in relation to that street, as there was in the Act of 1840 as to the other new streets, the only difference being that in this case the Metropolitan Board of Works made the street, and not the Commissioners of Woods and Forests. What I have said with regard to the other streets is also applicable to this street. In my opinion it was absolutely dedicated by statute to the public, and never became subject to any market rights at all.

The only other matters with which I have to deal are two subsequent enactments which relate to the North Metropolitan Tramway Company. Whenever that company obtained an Act, if it related to a tramway running along the High Street, as in the case of the Act of 1871, a clause was inserted for the protection of the hay and straw market. Where the tramway authorized did not run along High Street, there is only the ordinary protective clause for the Whitechapel Board of Works. When we come to the enactments of 1887 and 1888, we find that clauses are inserted for the protection of the hay and straw salesmen. The Whitechapel Board of Works got its usual protective clause, not mentioning the hay market, inasmuch as the tramways then provided for did not run along the High Street, but the hay and straw salesmen got a protective clause requiring the tramway company to make arrangements whereby in the side streets the trams should only run along the eastern set of rails and leave the western set of rails free during certain hours on market days. In my opinion these provisions have no bearing upon the present question at all. They are protective provisions obviously obtained by the hay and straw salesmen, binding the company as against them to leave the western rails free for their carts to stand upon, but they do not profess to give, nor do they in law give, any right to the salesmen excepting as against the company. Any one who is familiar with the procedure with regard to private Bills will realize that these clauses, effecting as they do nothing but an abridgment of the rights which the tramway company would otherwise have acquired by the Act, can have no effect either way upon the rights of the

public. That being so, in my opinion they create no market rights whatever in these side streets.

Evidence has been given of a memorial presented to the Metropolitan Board of Works in 1878, and a report by a committee of the Whitechapel Board of Works upon that memorial. All that is matter which is perfectly irrelevant, in my opinion, to the question whether there is a legal right which, if it exists at all, must have existed from time immemorial. All the use of these side streets for the purposes of the market of which it speaks is user long subsequent to 1853, and is referable, I think, to the powers given to the trustees by the Act of 1853, excepting that it is very probable that there has grown up in recent times, within the last thirty or forty years, a practice of anticipating the directions of the trustees and putting the carts without such directions in places where they would probably have been sent by their order, if not put there originally. Such a practice might easily arise, and it can have no bearing on the question whether an immemorial right to use the side streets for the purpose of a market existed. In my opinion no such right did exist, and therefore the defendants are entitled to succeed in this action, which is brought to try the question whether such a right existed. The defendants' counsel does not on their behalf defend the printed regulations which have been put up, and therefore I need not deal with them. They have, I understand, been withdrawn, and the defendants rely solely on the powers which they derive from the Act of 1853.

BUCKLEY L.J. The origin of the Whitechapel hay and straw market is lost in the obscurity of time. In a memorial which was presented to the Metropolitan Board of Works in 1878 it was suggested, and, for aught I know, truly, that by a Royal charter of Charles II., on the nomination of the Earl of Cleveland and Lord Wentworth, there was a grant to Sir William Smith, baronet, and his heirs for ever, of the right to keep a market on Saturday in every week at Ratcliff Cross. The memorial goes on to state that this market was transferred to High Street, Whitechapel, but how this came about the memorialists do not know. Nothing further appears to be known about this market until,

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coming down to a much later date, I find that in 1770 there was an Act of George III. which referred to and dealt with it; and again in 1853 another Act was passed in relation to it. From these Acts of Parliament I draw certain conclusions, the reasons for which I will presently give. I arrive at the conclusion that the market granted in this case was a market to be held in the parish of Whitechapel, but otherwise without metes and bounds, and that it was not confined to the High Street in that parish. The grant was, I gather, to the lord of the manor of the right to hold a market in the parish, and it would result from this that he could hold it at such place in the parish as he from time to time thought fit, assuming, of course, that he could have access to the land upon which he proposed to hold it. He could hold it on his own land; or he could hold it on the land of another, if that other were willing that he should do so. The question here is whether he could hold it upon certain public highways in the parish. That he could hold it upon one public highway, that is, High Street, Whitechapel, is not in dispute. The question is whether he could hold it in certain other streets, which I shall have to mention.

From the Act of 1770 I derive the following information as to this market. I find that the Act was passed under these circumstances. The High Street needed repaving, and it was proposed by the Act to provide for such repaving. During the repaving the market would be displaced from the High Street; and, accordingly, there is a clause which provides that, during the paving, and until it is completed, the commissioners appointed under the Act may direct carts and waggons loaded with hay and straw brought into the parish for sale on market days to be placed and stand in such of the streets or other places in the parish, and in such manner and form, as the commissioners may think proper; and it is further provided that, when the paving is completed and finished, the commissioners may direct where the carts are to stand in the middle of High Street. Then there is a clause dealing with the hours of holding the market. That clause speaks of it as the Hay-Market in the High Street, but later on it provides, after specifying the hours during which it is to be held, that, if

any person suffers his waggon to stand or be in any part or parts of the said street or market otherwise than in the authorized hours, he shall be subject to a certain penalty. This Act does not create a statutory right to take market tolls. It contemplates the existence of such tolls, and makes provision as to the manner in which they are to be dealt with, but it does not create the right to charge them. It assumes that they are chargeable by custom. On that Act of Parliament I make this observation. It confers a power, which I agree is temporary, on the commissioners to send the hay carts during the repaving of High Street out of that street into the adjoining streets, from which I infer that those streets must be within the limit of the market; because, otherwise, market tolls would not be chargeable in respect of them, and the statute contemplates that such tolls will be chargeable. The Act appears to me to assume that, although the market has its centre in High Street, it is a market which may be held, not necessarily only in High Street, but also in places adjoining thereto, and that the market tolls will be payable if the carts do stand in such adjoining places. Another indication to the same effect is to be found in the Act of 1853. That Act repealed the Act of 1770, and made further provision for the paving and regulation of High Street. Its most material section for the present purpose is s. 46, which enacts that, while paving is going on in High Street, the trustees may direct that such carts as are brought laden with hay for sale into the parish shall be placed and stand in such of the streets or other places in the parish, and in such manner, as the trustees shall from time to time direct and appoint. Then it goes on to provide—and this is most material—as to what is to happen when the paving is completed. When that is the case the trustees may, as in the Act of 1770, direct where the carts are to stand in the middle of the High Street; but there is an additional provision that, if the surveyor of the trustees finds that the thoroughfare of that street is impeded by too many carts or waggons standing therein, he may direct as many of the carts or waggons as he thinks expedient to stand in such of the streets or other places adjoining the High Street as to him shall seem convenient for the purpose. This, again, is an indication that the market is

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not confined to the High Street, but extends elsewhere; and we have here a substantive power created by statute in the trustees to send carts and waggons, whenever they think it expedient by reason of the thoroughfare of the High Street being impeded, to stand in such of the streets and other places adjoining as to them may seem convenient.

I may say here, before leaving this section, that I doubt whether the declaration made by the learned judge below is altogether correct. He has in effect declared that there is a right in the salesmen to place their carts in certain streets. I think that is too wide. I think there may be a declaration that the market extends to those streets, if and when the market regulations provide that it shall be held in those streets, but I do not think that the salesmen, apart from the regulations, have a right to choose where they shall stand.

Having gone through these Acts of Parliament, what I gather from them is as follows: that there is a market without metes and bounds, whose centre is High Street, Whitechapel, but which may be held in adjoining streets in the parish, and that, if it be held in adjoining streets, those streets will form part of the market; in other words, I get a market franchise—to use the expression used in *Attorney-General* v. *Horner* (1), "in sive juxta" High Street. The market need not necessarily be in High Street, but may be in High Street and the adjacent places.

That being the nature of the market, the subject-matter with which we have to do is certain new streets which were authorized to be made under the Acts of 1840 and 1865. The Act of 1840, it will be noticed, was before the Act of 1853, and the Act of 1865 was subsequent to that Act. The point of the case to my mind is this. Sect. 20 of the Act of 1840 and s. 16 of the Act of 1865, the sections by which the new streets were dedicated, both use the same form of words, "shall form part of the said streets and shall be used by the public accordingly." Now the effect of *Attorney-General* v. *Horner* (1), as I understand it, is this. The dedication there was one which rested on presumption, simply presumption from user, which is generally the source from which dedication of a highway is inferred. What

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

was held in that case was that, if you find a dedication by the owner of soil lying "juxta" the centre of a market, which could be held "in sive juxta" that particular place, it is a fair presumption that he dedicated his land to the public subject to the market franchise, which he must be taken to have known to exist. I will refer to two passages from the judgment of Brett M.R. in that case. He said (1): "But it was urged that, even if that were so, the market cannot be held in certain places in this district, because it was said that those places had been dedicated as streets to the public"; and then further on, "with regard to that it was answered that the streets were dedicated after the granting of the franchise, and that, taking that fact and the evidence that, for so many years from this date backwards, the streets have been used without real interruption (except in respect of something done by the police), we ought to hold that the streets were dedicated subject to the franchise, with the intention therefore that the market should not be interfered with"; and then, further on again, he said: "The real inference to be drawn with regard to the four outer streets is that the people who dedicated those streets took into account the fact of the market, and dedicated the streets subject to the market rights over them." Lord Selborne, in the House of Lords, practically said the same thing. He said (2): "This is not only consistent with the principles upon which presumptions from usage are ordinarily made, but in my judgment it is so consistent with the intrinsic probabilities of this case, and with the surrounding circumstances that, if I had as a juryman to draw an inference of actual fact, and not merely of legal presumption upon legal principles, I should presume it to be the case that these streets were laid out in connection with these buildings, and with this market, with a view to the existence of such a market as the charter contemplated, which is a market 'juxta' as well as 'in' that site. Nobody comes forward claiming a private right of property in the soil of any of these roads inconsistent with their use for market purposes." The point of difference in this case is that we are not left here to presumption as regards dedication. We have the sections of the Act of

(1) 14 Q. B. D. 255. (2) 11 App. Cas. 66, at p. 78.

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Parliament, which dedicate the streets to the public, and therefore we have to see what the dedication in fact made was. Was it a dedication subject to the market franchise, or was it not?

That leads me to say something as regards the particular streets in question. One of those made under the Act of 1840 was Leman Street. That was a widening of an existing and efficient street, called Red Lion Street, which existed before that time. Red Lion Street was within the provisions of the Acts of 1770 and 1853, to which I have referred. It was a street adjoining High Street, and therefore it was a street into which the proper authority under those provisions could send the market carts for the purposes of the market; and, when the Act of 1840 authorized the widening and extension of the street, and provided that the ground so added should form part of the street and should be used by the public accordingly, I understand that to mean "used by the public in such manner as the street to which it was added was used." Therefore it seems to me fairly plain that, as regards Leman Street, the dedication was subject to the market franchise.

The case of the next street, Commercial Street, is not so easy. Essex Street, the site of which forms part of it, had an access to High Street, but it was an access between two houses which lay somewhere about ten feet apart, and seemingly, from the old plan, under an archway, with only a ten feet entrance, and then the court or street widened; and it may be that carts could not or did not go in from High Street. I really do not know whether that was so or not. Mr. Avory suggested that at any rate a barrow could go in; that hay could go in on a barrow, or a man might take it in on his back. The case with regard to Commercial Street is not as plain as with regard to Leman Street.

The case with regard to the third street, Commercial Road, is more difficult still. That was made under the Act of 1865, and at the end adjacent to High Street it did not reproduce any existing street at all. It was there wholly on the sites of houses and the yards of houses; it was an entirely new street.

I will address myself to the case of Commercial Road, because that is the most difficult, inasmuch as that street did not replace any old street, but was wholly new. What is the proper pre-

sumption under the circumstances as regards the dedication by s. 16 of the Act of 1865 of Commercial Road as forming part of a street and to be used by the public accordingly? I think I am entitled to say that those who framed the Act of Parliament under which that street was dedicated knew that it would be a new street adjoining to the well-known and ancient market in High Street, Whitechapel, and that there was in the case of this market the right given by the Act of 1853, which had been passed at this date, to the trustees of the parish of Whitechapel to direct the carts, in case High Street was impeded, to stand in the adjoining streets; and I do not think that it is straining the principle of *Attorney-General* v. *Horner* (1) to say that, although in this case the dedication is not by presumption but by statute, it must be taken that, when this part of Commercial Road was dedicated as forming part of a street, and to be used by the public accordingly, it was so dedicated to a public who knew of and were subject to an existing market franchise exercisable in High Street and the adjoining streets. I am not forgetting that in *Attorney-General* v. *Horner* (2) Lindley L.J. said this, with which I respectfully agree: "Whether the Crown can by charter grant a man a right to hold a market in a public street, so as to obstruct the thoroughfare, is a point about which I have some doubt; but as it does not arise in this case I will say no more about it." I do not think it at all necessary to affirm here that the Crown could, as regards the street Commercial Road, which came into existence for the first time subsequently to 1865, grant a right by charter to obstruct it. I do not put my decision upon that ground; I put it upon the ground that the statute of 1865, properly read and understood, was a dedication of a new street to be enjoyed by a public as against whom there existed in this particular neighbourhood a market in and near High Street as a centre, with the right of using—I do not use the word "obstructing"—the streets in that neighbourhood for the standing of hay and straw waggons for the purposes of the market. If this conclusion is right as regards Commercial Road, it is a fortiori right as regards Leman Street and Commercial Street. I think, for these reasons, that the

(1) 14 Q. B. D. 245; 11 App. Cas. 66. (2) 14 Q. B. D. 245, at p. 264.

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dedication of these streets was made subject to the right of the market.

I must add one or two words as to what the right of the market was. I do not think that the salesmen in this market had a right to go just where they chose. I think that the right of the lord of the manor was to place his market in and near High Street, and that the right of the trustees, under s. 46 of the Act of 1853, was to determine from time to time where that market should be. They were bound to give proper facilities; but I think it would be within their power to say, for instance, "We will not hold the market in Commercial Road, because the traffic is heavy there—we will hold it in Leman Street and Commercial Street, to the exclusion of Commercial Road"; and I do not think the salesmen could say, "We insist on going into Commercial Road."

The proper declaration, I think, is one which will limit the right of the plaintiffs as salesmen to occupy the streets with their carts and waggons for the purposes of the market, so as to be consistent with regulations from time to time made by the proper authority under s. 46 of the Act of 1853. It seems to me that the first declaration is too large, and that the second declaration to some extent conflicts with the first, but as regards all this I understand there will have to be some discussion as to the proper form of order.

Appeal dismissed.

Nov. 30. The case came again before the Court for the purpose of settling the form of the declaration to be made. After hearing counsel for the parties, the Court varied the order of Swinfen Eady J. by substituting for the declaration which he had made the following:—

1. Declare that, when there is not sufficient standing room in the High Street, Whitechapel, for carts or waggons loaded with hay or straw intended to be sold in the said market, the plaintiffs are entitled, subject to and in accordance with directions from time to time given by the proper authority under s. 46 of the Whitechapel Improvement Act, 1853, to place such carts or waggons in one or more of the streets adjoining the said High

Street, including Leman Street upon the western line of tramway therein between Great Alie Street and south of the cross-over tramways, Commercial Street upon the western line of tramway therein between Wentworth Street and High Street, Whitechapel, and Commercial Road, all in the parish of Whitechapel, in the county of Middlesex, during the hours of the hay and straw market.

2. Declare that the defendants are not entitled to order such carts or waggons into Buckle Street, Colchester Street, and Plough Street, which do not adjoin the said High Street.

Order varied accordingly.

Solicitors for plaintiffs : *Baddeleys & Co.*
Solicitor for defendants : *G. Slade.*

E. L.

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Oct. 18, 19 ; *Nov.* 1.

Administration—Lease—Death of Lessee—Administrator ad Colligenda Bona—Power to Sell—Entry into Possession—Rent—Liability de Bonis Propriis—Yearly Value of Premises.

The lessee of certain premises died intestate on May 24. On June 7 the defendant was appointed administrator ad colligenda bona with power to sell the lease, and on that date he entered into possession of the premises. On June 24 a quarter's rent became due, but was not paid. On August 23 the plaintiff, the lessor, commenced an action against the defendant for recovery of possession of the premises on non-payment of rent, and for rent and mesne profits. Judgment for possession was obtained under Order XIV., and on October 18 the defendant went out of possession. The rent of the premises under the lease was 450*l.* a year. While the defendant was in possession he used reasonable diligence to find a purchaser of the lease or a tenant, but without success, and the only sum received by him in respect of the premises was 26*l.* 5*s.*, being rent from a sub-tenant of a part of the premises :—

Held, that the defendant, having entered into possession, was personally liable to the plaintiff for rent from June 7 to August 23 at the rate of 450*l.* a year, that being the yearly value of the premises, and for mesne profits at the same rate from the latter date to October 18.

ACTION tried by Channell J. without a jury.

The plaintiff's claim, as indorsed on the writ, was against the defendant as administrator of the personal estate and effects of

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Mrs. Maude Mary Le Couteur, deceased, for the recovery of possession of certain premises at Nos. 14, 16, and 18, Brook Street, Hanover Square, in the county of London, demised by the plaintiff to Mrs. Le Couteur for a term of years, which term had become liable to forfeiture for non-payment of rent. The plaintiff further claimed against the defendant as administrator, and alternatively in his personal capacity, arrears of rent and mesne profits.

The facts of the case, as found by the learned judge, were as follows: Mrs. Le Couteur had been the tenant of the plaintiff in the premises mentioned in the writ under a lease at the yearly rent of 450*l.*, with power to the lessor to re-enter on non-payment of rent. She carried on a photographer's business in one portion of the premises, and another portion had been sub-let by her. She died on May 24, 1905, intestate, and her husband died on the same day. At the date of her death the defendant, who was an accountant, had for some time been engaged in investigating her affairs on behalf of a person who was proposing to make her a loan. After her death a Mrs. Pattinson, who was her sister and sole next of kin, applied for letters of administration, but a caveat was entered. It did not appear for what reason or by whom this was done, and it was not material to the questions arising in the action. Mrs. Pattinson instructed the defendant to continue his investigation of the affairs of the deceased on her behalf. On June 7, 1905, on the application of Mrs. Pattinson, Bargrave Deane J. made an order that "letters of administration be granted to" the defendant "of the personal estate of Maude Mary Le Couteur, deceased, limited for the purpose only of collecting and preserving the said personal estate until a general grant of letters of administration of the said estate be made on exhibiting a declaration on oath of the particulars and value of the said personal estate and his sureties justifying. Liberty to apply to the registrar for leave to sell any part of the said estate."

On June 15, 1905, the registrar made an order that the defendant, the administrator appointed ad colligenda bona, have liberty to sell or dispose of the lease of the premises.

On July 1, 1905, letters of administration in accordance with

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the limitations imposed by the order of June 7 were granted to the defendant. The gross value of the estate amounted to 275*l.*

Before Mrs. Le Couteur's death the defendant had been advised that the lease of the premises in Brook Street was a beneficial one, and that a premium of 1000*l.* might possibly be obtained for it; and accordingly, after the order of June 15, he caused the lease to be put up for auction with a substantial reserve; but the reserve was not reached, and no sale took place. The defendant then tried, but failed, to obtain a tenant. From the date of the order appointing him administrator, the defendant was in actual possession of the premises. The rent, which became due on June 24, was not paid. The plaintiff took no step amounting to an unqualified election to treat the non-payment of rent as a ground of forfeiture until August 23, when he issued the writ in this action. The defendant entered an appearance to the writ, the appearance not being limited in any way. The Master gave judgment under Order XIV. for possession, but the defendant did not go out of possession till October 18. During the time that the defendant was in possession he received the sum of 26*l.* 5*s.* rent in respect of the sub-tenancy of a part of the premises.

At the date when the defendant went out of possession the grant of administration ad colligenda bona had not been withdrawn, no general grant of administration having at that time been made.

The defendant by his defence pleaded that by reason of the limited nature of the grant of administration to him he was not liable for arrears of rent or mesne profits; that he had no moneys in his possession with which to discharge the plaintiff's claim; that he had not rendered himself personally liable; and that, alternatively, if the lease became vested in him, it was only as administrator ad colligendum, and that he had not, and could not have, derived since the death any profits from the premises.

E. M. Pollock, K.C., and *G. W. Powers*, for the plaintiff. The defendant entered into possession of the premises, collected rent from the sub-tenants, and dealt with the property by endeavouring to obtain a premium for the lease. The effect of these acts

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was to make him an executor de son tort, and it is no answer to say that he was authorized by the Court to sell the lease: Bacon's Abridgement, tit. Executor, B 3; *Paull* v. *Simpson* (1); Williams on Executors, 10th ed. pp. 183, 184. As executor de son tort the defendant is personally liable for rent and mesne profits. The defendant is also personally liable as assignee of the lease, for the effect of the grant of administration ad colligenda bona with authority to sell the lease is to vest the lease in him: *Rendall* v. *Andreae.* (2) The lease having become vested in the defendant, he cannot restrict his possession of the premises to that of an administrator ad colligenda bona without any liability for rent: *Rubery* v. *Stevens* (3); *In re Bowes.* (4) The defendant is clearly liable for mesne profits from the date of the issue of the writ until he gave up possession, for the issue of the writ is conclusive evidence of the plaintiff's election to treat the non-payment of rent as a ground of forfeiture. The defendant is also liable for rent estimated according to the actual value of the premises from the date of the death, or at the latest from the date of the order appointing him administrator ad colligenda bona, down to the date of the writ: *In re Bowes.* (4)

Howard D'Egville, for the defendant. The lease did not become vested in the defendant so as to render him personally liable for rent. The defendant was merely appointed as a ministerial officer of the Court for the purpose of collecting and preserving the estate, and special powers were given to him in order to enable him to sell the lease. The lease only vested in him for that purpose: *In the goods of Schwerdtfeger* (5); *In the goods of Roberts.* (6) An administrator ad colligenda bona is in the same position as an administrator pendente lite was before the Court of Probate Act: *Gallivan* v. *Evans.* (7) If the plaintiff seeks to recover against the defendant as administrator, the plaintiff must shew that the defendant has assets: *Giles* v. *Dyson* (8); and the plaintiff must also prove that the defendant has derived profit from the lease. The evidence shews that the

(1) (1846) 9 Q. B. 365.
(2) (1892) 61 L. J. (Q.B.) 630.
(3) (1832) 4 B. & Ad. 241.
(4) (1887) 37 Ch. D. 128.
(5) (1876) 1 P. D. 424.
(6) [1898] P. 149.
(7) (1809) 1 Ball & B. 191.
(8) (1815) 1 Stark. 32.

premises were of less value than the rent reserved by the lease, and the defendant, being an assignee of the lease only in his capacity of a limited administrator, and having no assets, is discharged from liability: *Wollaston* v. *Hakewill* (1); *Patten* v. *Reid*. (2) The defendant has not rendered himself liable as executor de son tort. The acts relied on were acts done by the defendant for the purpose of carrying out the duties imposed upon him by the Court, and even after the issue of the writ the preservation of the estate required him to remain on the premises. The premises having proved to be unproductive, the defendant is not liable for any rent: *Remnant* v. *Bremridge*. (3) In any event his personal liability only extends to the amount actually received by him from the sub-tenant, for he could not by the exercise of reasonable diligence have obtained any more than he did during the period of his occupation: *In re Bowes* (4); *Billinghurst* v. *Speerman* (5); *Buckley* v. *Pirk*. (6)

E. M. Pollock, K.C., in reply. *Remnant* v. *Bremridge* (3) is a decision which has not been followed in later cases: *Hopwood* v. *Whaley*. (7)

Cur. adv. vult.

Nov. 1. CHANNELL J. stated the facts substantially as set out above, and said that the plaintiff, by issuing the writ on August 23, made a conclusive election to treat the lease as at an end, and that from that date until the defendant gave up possession on October 18 the defendant was a trespasser, and had no answer to the claim made against him personally for mesne profits from August 23 to October 18. The learned judge then continued as follows:—But there is also a claim against the defendant for rent or mesne profits in respect of his occupation of the premises before August 23, and that involves the necessity of considering the effect of a grant of administration ad colligenda bona.

The first question to consider is whether the grant to the defendant of administration ad colligenda bona vested the term

(1) (1841) 3 Man. & G. 297.
(2) (1862) 6 L. T. 281.
(3) (1818) 8 Taunt. 191.
(4) 37 Ch. D. 128.
(5) (1695) 1 Salk. 297.
(6) (1710) 1 Salk. 316.
(7) (1848) 6 C. B. 744.

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in him, and further, if it did, what are the consequences. It is stated in the old authorities that if an administrator ad colligenda bona exceeds his rights under the grant, he becomes an executor de son tort, and it is stated in various books that he has no power to sell any of the assets. In the 1st edition of Williams on Executors at p. 266 the law is thus stated: "The ordinary may take the goods of the deceased into his own hands, to pay the debts of the deceased in such order as an executor or administrator ought to pay them; but he, or the stranger who has letters ad colligendum, cannot sell them, without making themselves executors of their own wrong: the ordinary has only an authority, and no such power himself, and therefore he cannot give that power to any other."

That is how the rights of the ordinary were formerly understood. But in recent years it appears to have been the practice of the Probate Court to give the administrator express authority to sell, though it was said by the old authorities that there was no power to do that. The cases which have been referred to do not explain how this difference in practice originated, but I have had the assistance of the President of the Probate Division, who has not only given me his opinion, but also that of the senior registrar, and their opinion is that the modern practice is derived from s. 73 and certain other sections in the Probate Act, 1857, which constituted the Probate Court, under which it is considered that the Court has greater powers in this matter than formerly existed. Before that Act administration was only granted to some one who had a right to it, and an administrator ad colligenda bona was practically in the position of a receiver; but now, under s. 73, the Court may appoint as administrator any person whom it thinks fit to be administrator, and the view now held is that the Court has power to make a grant of partial administration to a temporary administrator, subject to such limits as the Court thinks fit to impose; and that the Court may give him the full powers of an ordinary administrator during the time that he is to act as administrator. It follows from this that, if an administrator ad colligenda bona is empowered to sell a lease, the lease must become vested in him for the time to the same extent as it is in an executor or in a general administrator.

Otherwise it is difficult to see how the administrator could effect a sale. When a person dies intestate his personal estate vests temporarily in the President of the Probate Division, and it is possible that, when authority is given by the Court to an administrator ad colligenda bona to sell a lease, that only means that he is empowered to find a purchaser, and that when he has done that the Court will make some further order vesting the lease in the purchaser, either by means of the appointment of an administrator in the full sense, or possibly the judge might himself convey the property to the purchaser, which, however, is a thing the judge is not very likely to do. But, however that may be, I am clearly of opinion that where a person is appointed administrator ad colligenda bona with power to sell a lease of the deceased's premises, that lease is vested in him during the period of time for which the grant is made.

Having arrived at the conclusion that the lease was vested in the defendant, the next question to consider is whether he became liable for the rent or any part thereof. *Rendall* v. *Andreae* (1), which is the latest case on the subject, is clear authority for saying that, although the lease does vest in the administrator, he does not become liable for rent if he does not enter on the premises. The defendant, however, did enter, and he is therefore liable to some extent in respect of his occupation of the premises. The question is to what extent. The law is clearly settled that where there is a letting at a rent which is higher than the value of the premises, an executor is only liable up to the amount of the value of the premises, that is, if he pleads properly. In this case the point is, I think, sufficiently raised on the pleadings. I am unable to say what is the logical reason for holding that an executor is liable for the value of the premises only, where the rent exceeds the value, but that is law. There is some difficulty in ascertaining what exactly is meant by the expression value of the premises in this connection.

In *Remnant* v. *Bremridge* (2) it was suggested that an administrator was only liable to the extent of the rent which he had actually received, but if it was intended to decide that as a proposition of law, the law has since been laid down differently;

(1) 61 L. J. (Q.B.) 630. (2) 8 Taunt. 191.

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and that case cannot now be regarded as an authority on the point, for the later cases make it clear, I think, that an administrator is liable, not only for the rent which he has actually received, but for what he might have received if he had used due diligence, or, as it is sometimes expressed, he is liable for the yearly value which the premises might have yielded. It is not necessary to go through all the cases; the most recent is *In re Bowes.*(1) But, after considering the authorities, I am still left a little in doubt as to how to deal with the facts of the present case. The rent reserved by the lease was 450*l.* The defendant was advised that the premises were worth more, but he failed to get a premium. The plaintiff, after having had the premises on his hands for some time, did eventually succeed in letting them at a higher rent—480*l.* That being so, it seems to me that 450*l.* a year is a fair estimate of the value of the premises, in the sense that that sum or a little more could be obtained from a tenant for a substantial period if time were allowed in which to find a tenant; but if what is meant by the expression yearly value of the premises is the sum actually received by the administrator, together with what he might have obtained by reasonable diligence, during the period that he in fact occupied, I have no evidence before me to shew that the defendant could have got much more than he actually did. If the defendant's occupation is taken to include the time from which he took possession until the forfeiture, that is, the date of the writ, he was only in occupation for less than three months, and I doubt whether he could have got much or any rent for the premises, which were business premises, on a letting for so short a time. I have looked at numerous cases in order to ascertain what is the proper rule to apply, but unfortunately in many of them the judges, while stating their agreement with the previous authorities, employ different language in expressing their views, and it is thus not easy to say in precise terms what is the principle to be deduced from the authorities; but in the latest case, *In re Bowes* (1), the expression used is that an administrator is liable for the yearly value of the premises, and the conclusion which I come to is that an administrator is liable in respect of the period during which he is in

(1) 37 Ch. D. 128.

possession for the same sum as a trespasser for the same period would be liable for as mesne profits, that is, for a proportionate part of what the premises would be worth if let by the year, and that I am, therefore, not justified in holding that the rent payable by the defendant should be calculated on a lower value than 450*l.* a year. If, on the other hand, the question depends on whether the defendant could have obtained by reasonable diligence during the time in question more than he did in fact obtain, I am not prepared to find as a fact that he could not have done so. He put the lease up for auction, but it was not sold. He tried to find a tenant, but did not succeed in getting one, and all that he received during his period of occupation was a small sum—26*l.* 5*s.*—from a sub-tenant of a part of the premises. A quarter's rent became due while the defendant was in possession, and it has been contended that he is liable for the whole of that; but I think that he is only liable for the proportion of the rent due in respect of the period during which he was actually in possession, and the sum which he has to pay must, in my opinion, be calculated at the rate of 450*l.* a year.

The only other question is whether the period of his possession dates from the death of Mrs. Le Couteur or from the date of the order making the grant of administration ad colligenda bona, and some difficulty has been created by an ambiguous answer to interrogatories. The law is that an executor's title is derived from the deceased, but that an administrator's title is derived from the Court which makes the grant; and I hold that the defendant is only liable from the date of the order appointing him administrator, i.e., June 7. It has been suggested that from the date of the death to the date of that order he was an executor de son tort, but there is no sufficient evidence that he took such part in the management of the estate during that short period as would make him liable, and I think there is nothing in that suggestion.

I give judgment for the plaintiff for 165*l.* and costs.

Judgment for plaintiff.

Solicitor for plaintiff: *J. Parker Ayres.*

Solicitor for defendant: *E. J. Q. Maggs.*

F. O. R.

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Nov. 2, 6, 9.

MANSELL *v.* GRIFFIN.

Assault—Schoolmaster—Assistant Teacher—Right of Assistant Teacher in Public Elementary School to inflict Corporal Punishment — School Regulations.

An assistant teacher in a public elementary school has authority to inflict corporal punishment on a pupil if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school, and such as the parent of the child might expect that the child would receive if it did wrong; and the fact that by the regulations of the school assistant teachers are forbidden to inflict corporal punishment will not of itself render the assistant teacher liable in an action by the pupil for assault.

Appeal from the decision of the Gloucestershire County Court ordering a new trial of the action.

The plaintiff, a girl of ten years of age, brought the action by her father, as next friend, against the defendant, who was a certificated assistant mistress in a public elementary school, for assault.

By the regulations made by the City of Gloucester Education Committee for the management of their public elementary schools, "corporal punishment shall be inflicted only for grave offences, and shall be forthwith recorded in a register for that purpose. No corporal punishment shall be administered by any one but the head teacher, or by certain certificated teachers specially named by him from time to time in such register; and in mixed schools corporal punishment on girls shall be inflicted by none but female teachers. All other teachers than those specially authorized are hereby absolutely prohibited from inflicting such punishment. All such punishments shall be inflicted with a birch rod or cane. Cuffs on the head, the pulling or boxing of the ears, blows with a book or slate, and other punishments causing bodily pain are strictly forbidden. Any infraction of this rule will be severely dealt with, to the extent, if thought necessary, of instant dismissal of the offending teacher."

There was no evidence that this regulation was known to the parents of the plaintiff.

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It appeared that the defendant, who was not specially authorized under the regulations to inflict corporal punishment, and who was herself unaware of the regulation, struck the plaintiff for a breach of school discipline some blows on the upper part of the arm, which was clothed, with a small flat ruler. The plaintiff was subject to cartilaginous tumours, and the blows falling on one of these tumours, which could not be seen by the defendant, produced a more serious effect than would have been caused in the case of a normal child. The action was heard by the county court judge and a jury. In answer to questions put to them by the county court judge, the jury found: (1.) That the punishment was moderate. (2.) That the instrument used was improper according to the school regulations, but not so hurtful as a birch rod or cane. (3.) That the exceptional constitution of the child was not known to the defendant. (4.) That the defendant had exceeded her authority under the regulations of the school. (5.) That the regulations had not been brought to the defendant's knowledge. (6.) That there were no damages.

On these findings the county court judge entered judgment for the defendant, and the plaintiff applied for a new trial on the ground that the jury was biassed and that their findings were against the weight of the evidence.

The judge ordered a new trial on the ground (as he stated) that there was a suspicion of bias, and that the first finding was against the weight of the evidence.

The defendant appealed on the grounds that the judge was wrong in law in holding that the verdict was against the weight of the evidence; that there was no evidence of bias on the part of the jury; and that there was abundant evidence on which the jury might reasonably find as they did.

Henry Lynn, for the appellant. The county court judge granted the new trial on two grounds, neither of which, he thought, was sufficient in itself to warrant him in setting aside the verdict of the jury. If either of those grounds, therefore, is shewn to be fallacious, he was wrong in granting a new trial. It is true that no appeal lies from the granting of a new trial by a

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county court judge on the ground that the verdict is against the weight of the evidence: *How* v. *London and North Western Ry. Co.* (1); but that was not the ground on which the judge granted the new trial in this case. He would not have granted the new trial unless he had found, as he said, that there was a suspicion of bias on the part of the jury. As to that there was no evidence whatever. (2)

[He was stopped.]

H. M. Sturges, for the respondent. The county court judge was right in granting a new trial, not only on the grounds that he has given, namely, that there was a suspicion of bias and that the first finding was against the weight of evidence, but also because the jury found no damages. The defendant had no authority to strike the plaintiff, and therefore, even if the blows were moderate, she is liable in damages. Not only was she prohibited by the regulations of the school from inflicting corporal punishment, but at common law she had no authority to do so. The power of inflicting corporal punishment possessed by a schoolmaster rests on the delegation of that power to him by the parent. That power is only delegated to the head master of a school, and never to the assistant masters. It can only be possessed by the under-masters by virtue of an express delegation to them by the head master of the right which has been impliedly granted to him by the parent: Addison on Torts, 8th ed. p. 165; Blackstone's Commentaries, 8th ed. vol. 1, p. 452; *Fitzgerald* v. *Northcote* (3); *Scorgie* v. *Lawrie* (4); *In re Basingstoke School* (5); *Hunter* v. *Johnson* (6); *Cleary* v. *Booth*. (7)

H. Lynn, in reply. The point was not taken before the county court judge, on the application for a new trial, that the defendant was liable in damages because, being an under-mistress, she had no authority to administer corporal punishment, and this Court cannot now deal with it. The defendant was appointed,

(1) [1892] 1 Q. B. 391.

(2) As the allegation of bias turned entirely on questions of fact, it is not thought necessary to report the argument and judgment on this point.

(3) (1865) 4 F. & F. 656.

(4) (1883) 10 R. 610.

(5) (1877) 41 J. P. 118.

(6) (1884) 13 Q. B. D. 225.

(7) [1893] 1 Q. B. 465.

and could only be dismissed, by the education committee, and not by the head mistress. She was therefore in a more independent position than are the assistant masters in the great public schools and grammar schools, who are appointed and dismissed by the head master. But every teacher has the right to enforce discipline by some punitive means, and, provided that the punishment inflicted is moderate and usual and is inflicted bona fide and without malice, no action for assault will lie, even although by the internal regulations of the school the teacher is forbidden to inflict it and it is expressly reserved to the head teacher.

Cur. adv. vult.

Nov. 9. PHILLIMORE J. This case has given my brother and myself a good deal of trouble, and we have spent a good deal of time in considering it. It was an action brought by a girl, who was a scholar in a public elementary school provided by the education committee of the city of Gloucester, against a certificated assistant mistress in that school for assault. It is enough to say with regard to the facts of the case that for some breach of school discipline the defendant struck the plaintiff three or four blows with a ruler on her arm at a part where the arm was clothed. It happened that the child had some disease or infirmity which made her liable to injury from such a blow, and I am afraid that in consequence she did suffer. The matter was tried before the learned county court judge and a jury, and he left these questions to the jury, which I am going to read, with their answers: " (1.) Was the punishment moderate or excessive? —Moderate. (2.) Was the instrument a proper or improper one to use?—Improper according to the rule, but not so hurtful as a cane or birch-rod. (3.) Was the exceptional constitution of the child made known to the defendant?—No. (4.) Did the defendant exceed her authority under the regulations?—Yes. (5.) Were the regulations brought to the knowledge of the defendant?—No. (6.) What were the damages?—None." I had better read rule 25 of the regulations made by the city of Gloucester Education Committee. [His Lordship read the regulation as to " corporal punishment " set out above.] The

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jury having found those answers, discussion took place before the learned judge as to how the verdict should be entered, and the learned judge, after hearing argument, rightly directed a verdict to be entered for the defendant; but he rather suggested an application for a new trial, and accordingly an application for a new trial was made before him, heard, and finally determined by him in the sense that he ordered a new trial. We have first to consider on what grounds he ordered a new trial. The application was, at any rate, partially on the ground that the verdict was against the weight of evidence; and where a county court judge grants or refuses an application for a new trial on that ground alone, and there is no matter of law involved in that decision, there is no appeal from that order to this Court. The case of *How* v. *London and North Western Ry. Co.* (1) decides that matter. If, therefore, the judge had proceeded on that ground alone, there would be no appeal from his decision. We have had some difficulty in determining whether that was the only ground on which he granted a new trial, but we have come to the conclusion that the county court judge did not ask himself, upon the question of the weight of evidence alone, "Should I, or should I not, grant a new trial?" but that he asked himself the question, "Should I, on the various grounds that have been raised against this verdict, grant a new trial?" The other ground raised against this verdict was that there was evidence of bias on the part of the jury. The judge has not gone so far as to say that there was bias, but he has called it a suspicion of bias. I doubt whether that would be enough in any view. He has, however, apparently rested his reasons for granting a new trial upon the double ground that there was a suspicion of bias, and a material finding—finding No. 1—against the weight of evidence. We think, therefore, that if one of those two grounds cannot be supported the learned judge has not granted the new trial in such a way that there can be no appeal from his decision. We are clearly of opinion that there was no evidence on which he could act with regard to the allegation of bias on the part of the jury. It is no doubt true that bias is generally a question of fact and of degree, and, therefore, a

(1) [1892] 1 Q. B. 391.

question for the discretion of the judge, from the exercise of which there is no appeal. But if there was no evidence on which the judge could exercise his discretion, then he has gone wrong in a matter of law, and an appeal lies from his judgment. In that respect the question of bias is like the question of costs. Where the matter is a matter of discretion, there is no appeal from the judge's decision as to costs in a county court, but if there are no materials on which he could properly exercise his discretion, an appeal lies. We think here that there was no evidence on which the judge could find even a suspicion of bias. [His Lordship then discussed the facts which led the Court to this conclusion, and continued :—]

That being the case, we are of opinion so far that the learned judge ought not to have granted a new trial, and we can say that without interfering with his prerogative to decide upon such questions as whether the verdict was against the weight of evidence. But it occurred to us that there was possibly another point to consider which might make the verdict of the jury here insensate or defective, and which might make it necessary that there should be a new trial, and which possibly may have been a third element in the judge's decision. We accordingly allowed counsel for the plaintiff, notwithstanding some protest by the counsel for the defendant, to support the judgment of the county court judge, on the ground that, having regard to some of the findings of the jury, there must have been an actionable trespass here, and there must be therefore some damages.

That turns upon the answers to questions 2 and 4: that the instrument was improper according to the rules, but not so hurtful as a cane or birch-rod, and that the defendant exceeded her authority under the regulations. It was contended before us that this teacher had no express authority under the regulations, and had no implied authority by reason of the relation between herself and her pupil, which would justify her in administering any corporal punishment (even though that punishment was moderate and not so hurtful as that which might have been administered with either of the authorized instruments of correction), and that therefore she had no defence to an action for assault. It is no doubt true that as a matter of the internal

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government of the school the teacher, though she did not know it, was prohibited from administering corporal punishment, and it is also true that the only instruments of corporal punishment authorized by the school regulations are a cane or birch. But it did not, in our view, necessarily follow that, because as a matter of internal government the teacher was prohibited from administering corporal punishment herself, that she was necessarily without defence when it came to be a question of an action brought by the pupil against her for trespass to the person or of an indictment for assault. It seems to us that the question must go deeper and must rest on more general considerations. It was admitted that the question depended on the delegation by the parent of the parental authority to administer moderate corporal punishment to a child; but it was contended for the plaintiff that a parent could only be considered as delegating his or her authority to a head master or head mistress, and this contention was founded on the position that this kind of regulation as to the administration of corporal punishment by under-teachers is very common, and that in the great public schools and grammar schools of the country corporal punishment can be inflicted only by the head master. As a matter of history that is not absolutely correct. In the great public school of Westminster, and I think in the great public school of Winchester, and also at Eton and probably in many of the great grammar schools of the country, there were two statutory or foundation masters; the others are all modern and all assistants. I think it will be found —I know it to be so in the case of Westminster—that where there were two such statutory officers the under, or second, master had, at least with regard to those who were specially under his control, the same powers of corporal chastisement as the head master had. But I do not rest upon that; we have to consider the general relation of pupil and teacher, and it has from the earliest times been the practice for teachers to enforce discipline by some form of coercion. Even if a parent put one child under the personal supervision of a tutor for that child alone, he must expect, unless he specially restrains the tutor, that the tutor will on some occasions administer some form of personal correction to the child; and the matter is a fortiori, when there

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is a large class, in which example has to be considered and discipline for a number of children has to be preserved. It is, I suppose, false imprisonment to keep a child locked up in a class-room, or even to order it to stop, under penalties, in a room for a longer period than the ordinary school time without lawful authority. Could it be said that a teacher who kept a child back during play hours to learn over and say his lesson again, or who directed a child to stand up and kept him standing perhaps for an hour, subjecting him thus to fatigue and to the derision of all his class-mates, or who put upon him a dunce's cap, as was frequently done in earlier days in the case of stupid or backward children—could it be said that such a teacher would be liable in an action for trespass to the person? The cases I have instanced are not cases of the infliction of blows, but they are cases of interference with the liberty of the subject, and it seems to me that the principle must be the same for all these cases. If that be so, there seems to me no reason why the power of punishment should necessarily be confined to the head master of the school. If there were regulations, or there was a known custom, confining the administration of corporal punishment to the head master of the school, and if those regulations or that custom were known to the parents, this would no doubt give rise to a strong argument to shew that the parent had only delegated to the under-teacher that authority which the rules of the school gave, and that the parent, therefore, had no more reason to expect his child to be struck by an assistant teacher than he would that the child would be struck by the caretaker of the school. Here, however, there is no reason to suppose that these regulations were brought to the knowledge of the parents, or that this child was sent to school on the faith of any such regulation or any such custom. The fact that the teacher herself did not know of the restrictive regulation is on this matter probably immaterial, although it does have a bearing on the question of the teacher's good faith. That being the case, on what does the authority of the teacher rest? My brother and I have considered this matter carefully, and I will read a sentence which he has been good enough to compose: "The ordinary authority extends, not to the head teacher only, but to the responsible teachers who have

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charge of classes." In other words, if I may add anything to what he has written, a teacher of a class has the ordinary means of preserving discipline, and as between the parent of the child and the teacher it is enough for the teacher to be able to say: "The punishment which I administered was moderate; it was not dictated by any bad motive, and it was such as is usual in the school and such as the parent of the child might expect that the child would receive if it did wrong." That being the case, if this punishment was moderate, and was not so hurtful as that which the regulations warranted, and was administered by a certificated assistant mistress who was in charge of this class, apparently some forty children, we think that she can in an action justify that which she did. I desire to add here that the position of a certificated mistress in a public elementary school is, as regards the head master or mistress of that school, a more independent one than the position of an assistant master in the great public schools, or the public grammar schools of this country. In those schools, for the most part, the masters other than the head master are merely his assistants, appointed by him and dismissed by him, subject possibly to the question of reasonable notice, at pleasure. A certificated assistant teacher in a public elementary school, such as the defendant, is not appointed by the head mistress and cannot be dismissed by her. She is appointed by the local education authority, and is removable by that body alone. In that respect, therefore, she has a more independent position than the assistant master at one of the higher grade schools.

We think, therefore, that, supposing the first and second findings of the jury are correct, the jury would be right in saying that there were no damages, and in finding a verdict for the defendant. But we think that the learned county court judge ought to have a further opportunity of considering whether he will or will not grant a new trial on the ground that the verdict was on a matter of fact contrary to the weight of evidence. We give no encouragement to the suggestion that this verdict ought to be set aside on that ground, but we think that the judge who has set it aside on two grounds may have thought one alone would be sufficient, and that he ought to

have an opportunity de novo of considering whether he will say that he so disagreed with the verdict of the jury in answer to question No. 1 that he thinks there ought to be a new trial. For that purpose the matter will be referred back to him.

WALTON J. I have really only a word to add. There is no evidence in this case that the parents of the plaintiff had any knowledge of the regulations of the school, and therefore it must be taken that the parents gave to the authorities of the school that ordinary authority which is presumed from the fact of a parent sending a child to a school. The defendant was the responsible mistress of the class in which the plaintiff was; she was responsible for the teaching and discipline of that class. It seems to me that the authority to administer moderate and reasonable corporal punishment, which any parent who sends a child to school is presumed to give to the authorities of the school, extends to a mistress occupying the position which the defendant occupied in this school at the time when the punishment in question was inflicted. There may be domestic regulations at the school of which the parent may know nothing which may be changed at any time, without any permission asked or any notice to the parent, which regulate when, where, and by whom corporal punishment is to be inflicted. It does not seem to me that such regulations of which the parent knows nothing qualify or limit the ordinary authority as to the administering of corporal punishment which a parent must be supposed to give to the school authorities when he sends the child to school.

I agree with the judgment that has been delivered by my brother Phillimore.

Appeal allowed: Case remitted to the county court judge.

Solicitors for appellant: *Baker & Nairne.*

Solicitor for respondent: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

A. P. P. K.

C. A.

1907
Oct. 17.

[IN THE COURT OF APPEAL.]

DAVIS *v.* MAYOR, &c., OF THE BOROUGH OF BROMLEY.

Local Government—Plans—Malicious Refusal of Local Authority to approve—Action.

An action will not lie against a local authority for maliciously refusing to approve of building or drainage plans deposited with them. If the local authority in rejecting the plans has been actuated by improper motives, and has merely pretended to exercise its power without addressing its mind to the question before it, the remedy of the person aggrieved is by a mandamus to the local authority to hear and determine his application.

Application of the plaintiff for judgment or for a new trial in an action tried before Lawrance J. and a special jury.

It appeared that the plaintiff, who was a builder and the owner of certain house property within the district for which the defendants were the sanitary authority, had been engaged in considerable litigation with the defendants, relating chiefly to the mode of drainage of his property, and especially as to the mode of draining the particular house in respect of which the dispute arose in this action. Eventually the plaintiff sent in to the defendants plans for the drainage of the house in question, and also for the addition of a motor house or stable; these plans were rejected by the defendants for alleged non-compliance with certain of their by-laws, to which, under the circumstances, it is unnecessary to make further reference. The plaintiff contended that the plans complied in all respects with the by-laws, and alleged that the defendants had rejected them from a feeling of spite arising from the previous litigation and without considering them upon their merits, and that they had not acted bona fide in the exercise of their duty as a sanitary authority. The present action was thereupon brought, in which the plaintiff claimed—(1.) a declaration that he was entitled to construct the drainage of the house in accordance with the plans sent in to the defendants, and to connect the drains with the defendants' sewers; (2.) an injunction to restrain the defendants from hindering him in so constructing and connecting his drains;

and (3.) 500*l.* damages. In his statement of claim the plaintiff charged the defendants with having wilfully and maliciously, and in breach of their duty as the sanitary and building authority, disapproved of his plans. At the trial evidence was called by the plaintiff in support of his case, but eventually Lawrance J. non-suited the plaintiff, on the ground that, even assuming that the defendants were actuated by improper motives, the action would not lie, from which decision the plaintiff now appealed. The plaintiff also appealed on the ground of improper rejection of evidence, but it became unnecessary to argue this point, which need not be dealt with in this report.

Montague Shearman, K.C. (*F. Dodd* with him), for the plaintiff. It is admitted that an action would not lie against a local authority for a bona fide rejection, without malice, of plans as not being in accordance with by-laws, but the foundation of the present action is that the plaintiff's plans were rejected without proper consideration and from an improper motive. It is the statutory duty of a local authority to pass plans which comply with their by-laws, and an action will lie against them for maliciously refusing to pass plans. The case of *London and North Western Ry. Co.* v. *Westminster Corporation* (1) is an authority for the proposition that an action will lie against a sanitary authority for a breach of duty when it is acting from an improper motive, and the subsequent reversal of that decision on the facts by the House of Lords (2) did not affect the view of the law taken in the Court of Appeal.

[BIGHAM J. There is no case of such an action as the present, and it would obviously be dangerous to allow it, for it would then be open to every one whose plans had been rejected to bring an action.]

In the present case the evidence shewed that the objections taken by the defendants to the plans on the ground of non-compliance with the by-laws were ridiculous in themselves, and that they must have been taken under the influence of an indirect and malicious motive, and the plaintiff is entitled not only to a declaration of his rights and to an injunction, which would be an

(1) [1904] 1 Ch. 759. (2) [1905] A. C. 426.

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inadequate compensation for the trouble and expense to which he has been put, but also to substantial damages for his loss, which he could not get if his only remedy is by applying for a mandamus. [They also cited *London, Brighton and South Coast Ry. Co.* v. *Truman* (1); *Smith* v. *Chorley Rural Council.* (2)]

Montague Lush, K.C., and *Adam Walker*, for the defendants, were not called upon to argue.

VAUGHAN WILLIAMS L.J. We need only deal with the question whether an action will lie against this borough council as a local sanitary authority for their refusal to sanction the execution of certain building and drainage works according to plans deposited by the plaintiff. It is not contested that the Legislature has given power to this body to decide whether they will sanction such works or not; it is not suggested that in so deciding the council are exercising judicial functions, and in fact they are not doing so; they are exercising a discretion vested in them by statute, and the whole object of this action is really to see if, by this means, the plaintiff can overrule the council's decision. It is contended that that decision is so unreasonable as to afford ground for saying that the council was actuated by oblique motives by which they should not have been actuated, it being suggested that there was a feeling of bitterness against the plaintiff personally, the result of long litigation. Even assuming the facts to be such as to suggest that the defendants were actuated by such motives, there remains the fact that the Legislature has vested in this body the duty of deciding whether or not its sanction shall be given to the plans sent in. In my opinion, where a statute vests in a local authority such a duty and such a power, no action will lie against that authority in respect of its decision, even if there is some evidence to shew that the individual members of the authority were actuated by bitterness or some other indirect motive. The intention of the Legislature was that there should not be an opportunity of setting aside or getting rid of the decision of a local authority by bringing an action against that authority, and it is obvious that a

(1) (1885) 11 App. Cas. 45. (2) [1897] 1 Q. B. 678.

jury would not be a convenient tribunal for the trial of such an action.

If it is suggested that the result of our decision, affirming that of Lawrance J., would leave the plaintiff without a remedy, the answer is that, although an action for damages will not lie, there is nevertheless a remedy where the Court can see from the facts that, although the local authority has made a pretence of exercising its power, it has nevertheless in truth and in fact never addressed its mind to the question before it; in such a case a mandamus to hear and determine the matter might be obtained in the King's Bench Division. It is perfectly clear that this action will not lie, and therefore no question can arise for our decision as to whether there was any improper rejection of evidence.

SIR GORELL BARNES, PRESIDENT, and BIGHAM J. agreed.

Appeal dismissed.

Solicitor for plaintiff: *Lewis W. Gregory.*

Solicitors for defendants: *Sharpe, Parker & Co., for W. Jermyn Harrison, Bromley.*

W. J. B.

C. A.

1907

July 20;
Dec. 2.

[IN THE COURT OF APPEAL.]

LISTER *v.* HOOSON.

Bankruptcy—Set-off—Gift of Money by Bankrupt to Wife—Gift void as voluntary Settlement—Claim by Trustee in Bankruptcy—Debt due from Bankrupt to Wife—Right of Wife to set off—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 47.

A payment of 250*l.* by a bankrupt to his wife before bankruptcy was declared void against the trustee in bankruptcy as a voluntary settlement. At the date of the bankruptcy a debt of 250*l.* was due from the bankrupt to his wife. In an action by the trustee to recover the sum of 250*l.* from the wife, she claimed to set off the debt of 250*l.* due to her from the bankrupt:—

Held (Fletcher Moulton L.J. dissenting), that the 250*l.* claimed in respect of the voluntary settlement was not a debt due to the bankrupt from his wife, and that there was, therefore, no right of set-off under s. 38 of the Bankruptcy Act, 1883.

Appeal from the judgment of Grantham J.

The plaintiff, as trustee in the bankruptcy of W. Hooson, claimed to recover from the defendant, the wife of the bankrupt, the sum of 250*l.* which the bankrupt had paid to her within two years of his bankruptcy, that payment having been declared by an order made in the Bankruptcy Court to be void as against the trustee in bankruptcy as a voluntary settlement under s. 47 of the Bankruptcy Act, 1883. (1) At the commencement of the bankruptcy the bankrupt was indebted to his wife in the sum of

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be paid on either side respectively; . . . ."

Sect. 47: "(1.) Any settlement of property not being a settlement made before and in consideration of marriage . . . . shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy. . . . ."

700*l.*, which was secured by a mortgage, and she valued her security at 450*l.*, and claimed to prove for the balance of 250*l.* In this action the defendant claimed to set off that sum of 250*l.* against the claim of the plaintiff, as trustee in bankruptcy, for the 250*l.* paid to her under the void voluntary settlement.

At the trial Grantham J. gave judgment for the defendant, holding that she was entitled to the set-off.

The plaintiff appealed.

T. P. Perks, for the appellant. By s. 47 of the Bankruptcy Act a voluntary settlement is made void only against the trustee in bankruptcy, but otherwise remains a good and valid settlement: *In re Sims, Ex parte Sheffield.* (1) That being so, the trustee in bankruptcy acquired a special title to this sum of 250*l.* independently of the bankrupt, and the defendant cannot set off against that sum a debt due to her from the bankrupt. Under s. 47 a voluntary settlement is not void ab initio, but is voidable only at the instance of the trustee: *In re Carter and Kenderdine's Contract.* (2) Therefore the defendant never could have had any claim against her husband in respect of this settlement; she acquired a sum of money as her own under circumstances which never could give her any claim against him. That could not be a mutual credit, debt, or dealing within s. 38. That section provides that "an account shall be taken of what is due from the one party to the other in respect of such mutual dealings." No account could be taken between the defendant and the bankrupt in respect of this settlement. The account is not to be taken between the third person and the trustee; and the sum of 250*l.* became due to the trustee, and not to the bankrupt, and could not be an item in any account between the bankrupt and the defendant. Mutual credits, debts, or dealings, to come within s. 38, must be of such a kind that they may result in debts due from one party to the other: see notes to *Rose* v. *Hart* (3); but the transaction in respect of this settlement never could result in a debt due from the bankrupt to his wife.

(1) (1896) 3 Manson, 340. (2) [1897] 1 Ch. 776.
(3) 2 Sm. L. C. 11th ed., p. 308.

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[*In re G. E. B.* (1), *Eberle's Hotels Co.* v. *Jonas* (2), and *In re Washington Diamond Mining Co.* (3) were referred to.]

No counsel appeared for the respondent.

Cur. adv. vult.

Dec. 2. VAUGHAN WILLIAMS L.J. read the following judgment:—The principal question in this case is whether, in a case where a settlement on a wife has been declared void as against the trustee in the bankruptcy of the husband and the trustee sues the wife to recover the money paid to her under the avoided settlement, in this case 250*l.*, the wife can set off a sum due to her from her husband at the date of the bankruptcy. Now, generally, in order that debts may be set off they must be due respectively in the same right, and this rule applies as much to set-off under s. 38 of the Bankruptcy Act, 1883, which is the section of that Act governing mutual credit and set-off, as it does to set-off between solvent persons under the statutes of George II. (4), and under s. 38 of the Bankruptcy Act, 1883, a debt due to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate cannot be set off against a debt from or to the bankrupt before the bankruptcy. Now the 250*l.* which the husband paid to his wife in pursuance of the settlement which he had made on her never could have been recovered from her by the husband, but it can be recovered by the trustee in his bankruptcy. It is plain that at the date of the bankruptcy there was no debt due from the wife to the husband, and there is therefore no debt which the wife can utilize to pay herself the mortgage debt due to her from her husband, but she must come in and prove and get a dividend like the other creditors who have no available set-off. It is argued that the case of *In re Farnham* (5), which decided that where a settlement on a wife was avoided by the trustee in the bankruptcy of the husband, a lunatic, the plate, the subject of the settlement, reverted to the husband as donor, and vested in the trustee in bankruptcy and was distributable among the creditors, is authority to

(1) [1903] 2 K. B. 340.
(2) (1887) 18 Q. B. D. 459.
(3) [1893] 3 Ch. 95.
(4) 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, s. 4.
(5) [1895] 2 Ch. 799.

shew that there were at the date of the bankruptcy such mutual rights between the bankrupt and his wife as to entitle her to the benefit of a set-off under s. 38. With the greatest deference I cannot agree. There never was a moment of time during which the bankrupt could have claimed the 250*l.* or have brought it into account. I think, moreover, that Mrs. Hooson cannot, by refusing to return this money to the trustee, create a right of set-off which she would not otherwise have had: *In re Pollitt, Ex parte Minor* (1); *Turner* v. *Thomas.* (2)

I think this appeal must be allowed, and judgment must be entered for the plaintiff.

FLETCHER MOULTON L.J. read the following judgment:—The facts of this case are very simple. The plaintiff is the trustee in bankruptcy of Mr. Walter Hooson, the husband of the defendant. Shortly prior to the bankruptcy Mr. Walter Hooson paid the sum of 250*l.* to his wife by way of voluntary settlement which was void as against the plaintiff. Accordingly the plaintiff took proceedings in the Halifax County Court to have the settlement declared void in the bankruptcy, and an order to that effect was made on March 16, 1906. Subsequently, on April 19, 1906, the present action was brought to recover the 250*l.* from the wife who had received it. There is no dispute as to the title of the trustee to the money, but the bankrupt was indebted to his wife in the sum of 700*l.*, for which she held some, but insufficient, security, and she claims to set off the 250*l.* against the balance of the debt after valuing the security. The question is whether she is entitled so to do under the above circumstances.

There is no doubt that she would be entitled to do so if the 250*l.* were an ordinary debt, as for instance if it were money paid to her on behalf of the bankrupt for which she was accountable to him, and in my opinion the defendant stands in the same position for all purposes material to this case as if she had actually received the money at the time it was paid over to her as money had and received to the use of the bankrupt. The intention of paying the money was no doubt to make a voluntary settlement on her, but that is void in the bankruptcy, and

(1) [1893] 1 Q. B. 175, 455. (2) (1871) L. R. 6 C. P. 610.

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Fletcher Moulton L.J.

therefore she holds the money to the use of the estate. It is true that in the present instance a separate proceeding was instituted for the purpose of declaring the settlement void, but it was not essential that this should be done by a separate proceeding. Had the trustee sued for the money as a debt he would have been entitled to recover it in the action, for, although it is settled law that the voluntary settlement is voidable only and not void, this does not mean that any formal avoidance is necessary by the trustee, but only that it cannot be made void by other parties interested in invitum as regards the trustee. The bringing of an action for the money would have been ample exercise of the election of the trustee to treat the settlement as void. And, if void, the money is in my opinion in the same position as if it had all along belonged to the estate and therefore the subject of set-off.

The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, &c., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate. Nor can I find any countenance for such a proceeding in decided cases. Lindley L.J. laid down in the Court of Appeal that the right of set-off existed in the much stronger case of payments void as fraudulent preferences: *In re Washington Diamond Mining Co.* (1); and damages due to fraudulent representation in the sale of an article, although they are of the nature of unliquidated damages and can only become a debt by action brought by the trustee, were, in the case of *Jack* v. *Kipping* (2), held to be the subject of set-off, and I can see no reason whatever why the circumstances of the present case should prevent it being applied in the present case. It was strongly urged before us that moneys belonging to the estate by

(1) [1893] 3 Ch. 95. (2) (1882) 9 Q. B. D. 113.

reason of the provisions as to voluntary settlements are not the subject of set-off because the Act says that a voluntary settlement is to be void "against the trustee in the bankruptcy," and that the interposition of the trustee makes some difference. In my opinion the trustee is merely a representative of the estate, and these provisions mean neither more nor less than that the money shall be considered to be due to the estate for the purposes of the bankruptcy, i.e., for paying the creditors of the estate. There is no object or meaning in drawing a distinction, so far as concerns the right of the estate to moneys to be used for this purpose, between those rights which require in the first instance some initiatory action on the part of the trustee and those that do not. There cannot be a more absolute right of the estate to property than that it should be a debt unquestionably due to the estate requiring no action whatever on the part of the trustee to make it recoverable. If set-off is allowed in such a case, it would in my opinion be contrary to reason to suggest that anything which falls short of this should be treated in a harsher manner.

These considerations are so familiar in bankruptcy law, and of such constant application, that, speaking for myself, I do not think that any question would have been raised in the present case had it not been for the decision in the case of *In re Sims, Ex parte Sheffield.* (1)

This decision appears to me to be correct. But in my eyes it has nothing to do with the present case. It deals with equities wholly different from those which arise here, and which from their nature cannot come into conflict with them. So long as the estate is in bankruptcy, that is to say, so long as the trustee in virtue of his position is collecting sufficient of the assets of the estate to pay the creditors in full, there are no degrees, if I may use the phrase, in his right to claim those assets. He is not bound (either in order of time or otherwise) to collect first such assets as consist of unquestioned debts and do not depend on the exercise of the rights specially given to a trustee in bankruptcy to claim property which under ordinary circumstances would not belong to the bankrupt. If he can

(1) 3 Manson, 340.

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more speedily or more conveniently discharge the liabilities of the estate by setting aside a voidable settlement, or claiming goods as being in the order or disposition of the bankrupt, rather than by the tedious process of collecting trade debts, he is entitled to do so, and in my opinion would be entitled to do so, if otherwise the payment of the debts of the estate would be delayed. For, so long as the estate has not discharged its liabilities, he has but one duty, and he is entitled to use all the powers that are entrusted to him to enable him to perform that duty as speedily and as completely as possible.

An estate may be bankrupt, although the assets exceed the liabilities, by reason of the fact that those assets are in such a form that they cannot discharge the liabilities of the estate as and when they ought to be discharged. The intervention of bankruptcy may remedy this, and after payment by the trustee of the liabilities of the estate there may remain a surplus. When that occurs a wholly new set of rights arise. For the purpose of discharging the liabilities the representative of the estate possesses rights not possessed by the bankrupt; but it is not the intention, nor is it the effect, of the legislation that the bankrupt should himself profit by those rights. They are given for the benefit of the creditors of his estate only. If, therefore, a settlement has been set aside as against the creditors, which was good as against the bankrupt at the time that he made it, there is no possible reason why he should reap the benefit of the settlement being so set aside when and so soon as his creditors have been satisfied and the surplus of the estate comes back to him. From this state of things there arise rights such as those which were enforced in *In re Sims, Ex parte Sheffield.* (1) But from their very nature these rights cannot affect the trustee during the progress of the bankruptcy except so far as it may be necessary or convenient to look forward to the occurrence of a surplus and to provide by anticipation for the state of things then arising. It cannot, in my opinion, affect such questions as arise in this action.

But apart from the above reasoning, which to my mind is sufficient, I am of opinion that we are concluded in the matter by

(1) 3 Manson, 340.

authority. In the case of *In re Farnham* (1) a bankrupt had made a voluntary settlement on his wife of certain plate within two years of his bankruptcy, and had then become a lunatic and his wife was appointed committee. On an application by the trustee to have the plate handed over to him, the question arose as to whether the jurisdiction of the judge in lunacy came in, the trustee contending that as the settlement was valid as between the husband and wife the plate did not form part of the property of the lunatic at the date of the order, and therefore never passed under the hands of the judge in lunacy, but passed directly to the trustee under a title which did not concern the judge in lunacy. But the Court of Appeal refused to accept the argument. Lindley L.J. says (2): "If the settlement is void as against the trustee, it is void altogether. The section does not mean that the property, the subject of the settlement, vests in the trustee by a title which overrides both that of the donor and of the donee. The settlement being void, the property reverts to the donor, and it is as the donor's property that it vests in the trustee and must be distributed correctly." Rigby L.J. is equally explicit. He says (3): "He urged that the gift was perfectly good as between husband and wife only, and that the property comprised in it remained the property of the wife, though vested in the trustee in bankruptcy. That depends on the proper construction of s. 47 of the Bankruptcy Act, 1883, which provides that such a settlement as this is assumed to have been, shall be—and it has been in fact admitted by the wife to have been—void as against the trustee in bankruptcy. It being, then, a void settlement, he can take nothing under it. What, then, is the alternative? It is quite plain that the Act intended that the property should come to the trustee, not as the property of the beneficiary under the settlement, but as if the settlement never had existed; that is to say, it passes as the property of the bankrupt, the lunatic."

In thus deciding the Court of Appeal was following the same principles that had been laid down by Chitty J. in *Sanguinetti* v. *Stuckey's Banking Co.* (4), where a trustee, after claiming that a

(1) [1895] 2 Ch. 799.
(2) [1895] 2 Ch. at p. 808.
(3) [1895] 2 Ch. at p. 811.
(4) [1895] 1 Ch. 176.

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settlement was void as against himself, attempted to set it up as against subsequent incumbrancers. He was held not entitled to do so, and the learned judge remarks upon "the peculiar position taken up by the trustee in bankruptcy" when he claims that the very document that he had set aside as against himself is still a document or a settlement that he can set up as against another party.

These decisions appear to me to lay down that the right of the trustee to property under a void settlement is based on its being property of the bankrupt, and I can see no reason, therefore, why it should be treated otherwise than any other money belonging to the bankrupt in the hands of the same person would be treated. Both under the wide words of the section and under the fundamental principles of bankruptcy jurisdiction, therefore, I am of opinion that the 250*l.* is a proper subject of set-off.

BUCKLEY L.J. read the following judgment: — Immediately before the bankruptcy the position was that the wife had received 250*l.* paid to her by her husband as a voluntary settlement, and that the wife was a creditor of the husband for 700*l.*, for which she held a certain security. As between the husband and the wife the voluntary settlement was binding. There was, therefore, no 250*l.* due from the wife to the husband to be set off against the 700*l.* due from the husband to the wife.

When bankruptcy supervened the voluntary settlement was void as against the trustee under s. 47 of the Bankruptcy Act, 1883, and the trustee became entitled to call upon the wife to pay him the 250*l.* The wife argues, and the learned judge has held, that she is entitled to set-off. If this be right, the result is that she receives payment in full of 250*l.*, part of the 700*l.* due to her.

I have already pointed out that there was nothing to set off between the husband and the wife. There is, further, no right of set-off as between the wife and the trustee so as to give the wife payment pro tanto in full. It remains to consider whether there can be a set-off as between the wife and the trustee by virtue of s. 38. That section speaks of mutual dealings between the debtor and another person, and an account to be taken of what is due from the one party to the other in respect of such

mutual dealings. The mutual dealing was between the husband and the wife. The account, therefore, is to be stated as between the husband and the wife. In an account as between those two parties there was no 250*l.* due from the wife to the husband, for as between those parties the settlement was valid. The strongest way of putting the argument in the wife's favour is to assert that the mutual dealing was one which included a stipulation as between husband and wife that, if the husband was bankrupt, the wife would repay. Those parties, however, could not contract that in that event repayment should be made by set-off as between the trustee and the wife.

In my opinion s. 38 does not apply. If the judgment below were right, beneficiaries under a voluntary settlement, which would be void as against a trustee in bankruptcy, could advance the moneys included in the voluntary settlement to the settlor without any fear of consequences in the event of his subsequent bankruptcy. If they did not so advance, they would have to repay if the debtor became bankrupt. If they did so advance, they would be exactly in the same position, for they would be entitled against their liability to make repayment of the settlement moneys to set off the amount due to them in respect of their advances. The contention involves that a particular creditor can so deal with the debtor as to entitle himself in the event of the debtor's bankruptcy to obtain pro tanto payment in full. In my opinion he cannot.

I think the appellant is entitled to succeed.

Appeal allowed.

Solicitors for appellant: *Williamson, Hill & Co., for Charles Clarkson, Halifax.*

F. O. R.

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[IN THE COURT OF APPEAL.]

SAMUEL BROTHERS, LIMITED *v.* WHETHERLY.

Army and Navy—Volunteer Corps—Commanding Officer—Liability on Contract—Goods supplied for Use of Corps—Volunteer Act, 1863 (26 & 27 *Vict.* c. 65), *ss.* 16, 25—*Regulations* 407, 587.

Appeal of the defendants from a decision of Walton J. in an action tried without a jury, reported [1907] 1 K. B. 709.

The facts and arguments are set out at length in the report of the case in the Court below. It is sufficient here to say that the plaintiffs claimed from the defendants, the executors of the late Colonel Whetherly, a sum of 2312*l.* 5*s.* 8*d.* for uniforms and other goods supplied by the plaintiffs for the use of a volunteer corps whilst Colonel Whetherly was the commanding officer. At the trial Walton J. found as a fact that the orders for the goods were given by Colonel Whetherly or on his behalf personally, and held that he was liable personally for the goods supplied by the plaintiff on those orders, and that the defendants, as his executors, were liable in the present action. The defendants appealed.

Foote, K.C., and *H. Stuart Sankey*, for the defendants.

Rufus Isaacs, K.C., and *Le Riche*, for the plaintiffs, were not called upon to argue.

The Court (Lord Halsbury, Sir Gorell Barnes, President, and Bigham J.) said that the case, as was practically admitted by counsel in argument, raised merely a question of fact, and that they were quite unable to dissent from the finding of fact of Walton J., or from his inference from that finding, that Colonel Whetherly intended to make himself liable to the plaintiffs, with which finding and inference they intimated their agreement.

Appeal dismissed.

Solicitor for plaintiffs: *A. E. Sydney.*
Solicitor for defendants: *Wellington Taylor.*

W. J. B.

TILLMANNS & CO. *v.* SS. KNUTSFORD, LIMITED.

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Oct. 22, 23.

Ship—Bill of Lading—Charterparty—Signature of Bill of Lading by Time Charterer on behalf of Shipowner—Construction of Bill of Lading—Port "inaccessible on account of Ice"—"Any other Cause"—"Error in Judgment" of Master.

Goods were shipped on board a steamship under four bills of lading which contained the following conditions and exceptions: "(2.) Error in judgment, negligence or default of . . . . master . . . . or other persons in the service of the ship, whether in navigating the ship or otherwise"; "(4.) Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease."

At the time the bills of lading were signed, the steamer was under a time charter which contained the following clause: "(12.) The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibility as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual."

The time charterers signed one of the bills of lading "for the captain and owners":—

Held—(1.) that the signature of the time charterers to the bill of lading bound the shipowners; (2.) that "inaccessible" in the bills of lading did not mean inaccessible at the moment the ship first arrived off the port, but inaccessible within a reasonable time after the ship arrived off the port and endeavoured to get in; (3.) that the words "error in judgment of the master" in clause 2 of the exceptions and conditions in the bills of lading did not include misconstruction by him of the bills of lading; (4.) that the words "or other cause" in clause 4 of the exceptions and conditions in the bills of lading must be read as ejusdem generis with war or disturbance, and therefore did not include ice.

Action tried in the Commercial Court before Channell J. without a jury.

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The plaintiffs' claim was for damages for breach of contract contained in certain bills of lading.

The plaintiffs, a German firm carrying on business at St. Petersburg, were at all material times holders and indorsees of bills of lading dated October 12 to 26, 1905. The bills of lading contained (inter alia) the following conditions and exceptions:—

"2. The act of God . . . . misfeasance . . . . error in judgment, negligence or default of pilot, master, officers, engineers, seamen, firemen, or other persons in the service of the ship, whether in navigating the ship or otherwise; risk of craft or hulk or transhipment; and all and every the dangers and accidents of the land and water, and of navigation of whatsoever nature and kind.

"4. Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease.

"12. The company reserves the right of forwarding the goods to their destination by any other vessel belonging either to this or any other company or individual, subject to all conditions which may be exacted by the companies or individuals who may complete the transit; the risk of transhipment, landing, storing and reshipment to be borne by the shippers, consignees, or owners of the goods, but the expense to be defrayed by the company. This right is not affected by abandonment of the ship by her crew or to the underwriter."

The bills of lading concluded in the following form:—

"In witness whereof the master or agent of the said ship hath signed bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated at the day of 1905.

"For the Captain and Owners."

At the time the bills of lading were signed the *Knutsford* was under time charter to Watts, Watts & Co., of London. By

clause 12 of the charterparty it was provided that "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibility as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual."

The shippers of the goods paid the freight in advance to Watts, Watts & Co. The bills of lading were four in number, three being signed by the captain of the *Knutsford* underneath the printed words "For Captain and Owners," and all dated October 12, 1905, the fourth being signed by Watts, Watts & Co., "For the Captain and Owners," and dated October 26, 1905.

The *Knutsford* having loaded her cargo at Middlesborough and London, sailed from London on October 28, 1905. On February 7, 1906, she arrived at Moji, and there took 400 tons of bunker coal on board. On February 8 she left Moji for Vladivostock with the 1500 tons of cargo and upwards of 400 tons of bunker coal. On the morning of February 12 she arrived off Askold Island, and in company with another steamer, the *Hawk*, tried to get into Vladivostock. There was a strong northerly wind, and the channel was much blocked and impeded by ice. In these circumstances the *Knutsford* failed to make progress, and on February 13 and 14 the same conditions prevailed, and though renewed attempts were made they failed, and on the latter date, after trying for three or four hours to break through the ice, the master of the *Knutsford* gave up the attempt.

During these attempts the *Knutsford* was about forty miles from Vladivostock. At about 4 P.M. on February 14 the *Knutsford* left for Nagasaki, leaving the *Hawk* behind. Channell J. did not doubt that the master of the *Knutsford* acted in good faith, and that he had to some extent the safety of the vessel

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under his consideration, but he (Channell J.) came to the conclusion that the paramount consideration in the master's mind was the delay which further attempts to get into Vladivostock would have caused. At the time he abandoned the attempt he had enough coal on board to have enabled him to wait three or four days longer, and there would have been no real danger in his waiting for that time, and if he had waited he would have been able to get into Vladivostock on February 15. In returning to Nagasaki the master thought he was acting in accordance with clause 4 of the exceptions and conditions contained in the bills of lading. On February 15 the *Hawk* tried again, and succeeded in getting into Vladivostock at 1.30 P.M. Evidence was given to the effect that Vladivostock was open between January 23 and February 28, with vessels going in and out almost daily. On February 17 the *Knutsford* arrived at Nagasaki. On February 24 Watts, Watts & Co. cabled to Dodwell & Co., their agents in Japan, to have the cargo discharged at Nagasaki. John Batt & Co., of London (who had been appointed by the plaintiffs to look after their interests), on being informed of that fact by Watts, Watts & Co., protested on the plaintiffs' behalf against the discharge. On February 26 the *Knutsford* commenced discharging, and on March 5 she finished discharging. On March 6 the *Knutsford* left for Moji. On April 2 the cargo landed ex *Knutsford* was loaded by the plaintiffs' instructions partly on the *Taifuku Maru* and partly on the *Daisan Kotohira Maru*. On April 10 the *Taifuku Maru* arrived at Vladivostock. On April 15 the *Daisan Kotohira Maru* arrived at Vladivostock.

The plaintiffs complained that by reason of the non-delivery of the goods at Vladivostock in accordance with the bills of lading they had suffered loss and incurred expense in respect of the landing and forwarding of the goods from Nagasaki to Vladivostock, and in respect of the consequent delay, deterioration, loss in weight, and loss of market.

It was arranged between the parties that if the defendants were liable there should be judgment for the plaintiffs for a sum to be agreed, with liberty to apply as to assessment of damages if necessary.

J. A. Hamilton, K.C., and *A. Adair Roche*, for the plaintiffs.

J. R. Atkin, K.C., and *Lewis Noad*, for the defendants. As to the bill of lading signed by the time charterers, Watts, Watts & Co., there is no evidence that the owners, the defendants, are liable. The captain only could bind the defendants by signing the bill of lading. Watts, Watts & Co. were not held out as having authority to direct the captain to sign for the shipowners. There is no evidence that Watts, Watts & Co. had any authority to direct the captain to sign for the owners. The expression "inaccessible" in clause 4 of the bills of lading means inaccessible at the time the ship arrives, and for a period of time thereafter, which makes it unreasonable for the ship to wait any longer. In the present case the captain made a series of efforts to get in. The term "inaccessible" is satisfied by temporary inaccessibility. If the captain has no reason to suppose the inaccessibility will be removed, the port is inaccessible within the meaning of the bills of lading.

The word "unsafe" in clause 4 of the bills of lading means that, although the port is not in a condition amounting to complete inaccessibility, yet there are causes which make the entry and discharge unsafe. In that case clause 4 of the bills of lading leaves it open to the captain's discretion whether he will discharge at some other port which is safe. The words "or other cause" ought not to be limited in a business document such as a bill of lading. They mean whether the port is, in fact, inaccessible, or whether, although it is accessible, the master deems it unsafe to enter. The expression "error in judgment" in clause 2 of the bills of lading absolves the defendants from any liability for non-delivery at Vladivostock. It includes misconstruction by the captain of the bills of lading.

J. A. Hamilton, K.C., in reply. The burden of proving facts within the exceptions in the bills of lading is on the defendants. The words "war, disturbance" in clause 4 of the bills of lading do not apply to the present case. Therefore the defendants must shew that the words "any other cause" are not ejusdem generis with the preceding words, if ice is to be included as a cause giving the master liberty to discharge the goods at some other safe port if he deems Vladivostock inaccessible on account of it,

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inasmuch as "ice" is enumerated in the former part of the clause. But there is no reason for departing from the recognized rule of construction that general words are to be construed as ejusdem generis with prior particular words. If the ejusdem generis rule is not to be applied, the words "any other cause" must mean even though the cause is not similar to war or disturbance. That cannot be the true construction. The first part of the clause is based on actual fact; the second part depends on the captain's discretion, and therefore the words "or any other cause" would not be expected to relate back to the first part of the clause. They only relate to the second part of the clause, and are ejusdem generis with consequence of war and disturbance mentioned in that part. If the words "or any other cause" are to be given their full effect, without applying the ejusdem generis rule, there would be no necessity for mentioning "ice" specifically. The intention of the parties was to leave matters affected by war or disturbance at any particular place, or similar causes, to the discretion of the master, who is on the spot, inasmuch as the facts are, when there is war or disturbance, in obscurity to those at a distance from it. It is clear that a great part of the captain's motive in not going to Vladivostock was his wish to avoid the delay.

The meaning of "inaccessible" is, not that the port is inaccessible merely at the moment of arrival, but also within a reasonable time after arrival, bearing in mind that the interests of the consignees have to be considered as well as those of the owners, and that, but for the provisions of clause 4 in the bill of lading, the master would by law have been bound to wait, possibly for many weeks: *Metcalfe* v. *Britannia Iron Works Co.* (1)

In the present case, if the master had waited till February 15, he would have been able to enter the port of Vladivostock. The master had sufficient coals to last beyond February 15. Some limitation must be placed on the words "error in judgment," otherwise the effect would be that the plaintiffs' whole commercial venture would be entrusted to the captain subject to the condition that he must not be dishonest. As the captain had orders from the time charterers to discharge his cargo at

(1) (1876) 1 Q. B. D. 613; (1877) 2 Q. B. D. 423.

Nagasaki, the discharge at that place could not be due to the captain's error in judgment. The act of Watts, Watts & Co. in signing the bill of lading was either authorized by the defendants at the time or ratified afterwards. They signed it for the master, and the owners made no objection.

CHANNELL J. In this case several points arise, but one only is of real difficulty. I will deal with the simpler points first. With regard to the effect of the signature of the fourth bill of lading by Watts, Watts & Co. in their own name, if the captain had signed that bill of lading by the direction of Watts, Watts & Co., which he would have been bound to do by the charterparty, he would, in my opinion, have bound the owners, notwithstanding that the real contracting party was the time charterer. Three bills of lading were so signed. They are all in one form, and are for the captain and owners even although they are signed by the hand of the captain and with his name. With regard to the fourth, Watts, Watts & Co., the time charterers, instead of directing, as they were entitled to do, the captain to sign, signed it themselves. I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it. If they had struck out the words "for the captain and owners," and then signed it, I think they would, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They purported to sign it for the captain and owners; and, therefore, to make it the contract of the captain and owners, and they had absolute power to do that by the terms of the charterparty. Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but for the reasons I have given I am of opinion that the fourth bill of lading is exactly on the same footing as the other three.

I will now deal with the question whether there was an error in judgment of the master within the meaning of clause 2 of the conditions and exceptions in the bills of lading. Assuming

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that the words "should entry and discharge at a port be deemed by the master unsafe" in clause 4 of the conditions and exceptions of the bills of lading do not apply to the present case (a point I will deal with presently), the question is whether the words "error in judgment," which introduce an exception to the liability of the contractors under the bill of lading if they do not deliver, apply. On that assumption no doubt the master made an error in judgment in one sense, because he misconstrued the bill of lading, as he thought that those words did apply. But I do not think that the words "error in judgment" mean that kind of error. In my opinion the phrase "error in judgment . . . . whether in navigating the ship or otherwise"—on the largest interpretation that can possibly be given to the word "otherwise," and I think it ought to have a wide meaning given to it in that sentence—could not cover such a matter as the misconstruction of the document under which the master was acting. In my opinion misconstruction of a document is something totally different from an error in judgment, and is not a matter which one would at all expect to be provided for by this kind of exception. Further, even if there was an error in judgment on the part of the master which delayed the delivery in the sense that he misconstrued the bills of lading, it did not prevent the delivery, because after he got back to Nagasaki the goods might have been sent on. He might have been ordered to go on in his own vessel—at any rate, the goods might have been delivered, and therefore it did not cause the non-delivery even although it might have caused some delay.

I will now consider clause 4, which really is the important one: "Should a port be inaccessible on account of ice, blockade, or interdict . . . ." On the evidence I am of opinion that the port of Vladivostock was not inaccessible. I do not think "inaccessible" means inaccessible at the particular moment when the ship first arrives off the port. It is clear that the master must wait a reasonable time on reaching the port. Many illustrations might be given. Practically at the same time as the *Knutsford* arrived off the port, other vessels did get through. It is true that I do not think that the *Knutsford* could have got in on

either of the three days the 12th, 13th or 14th of February, 1906, but in my opinion that was not sufficient to make the port inaccessible. The port was no more inaccessible than one which at low water has not a sufficient draught over the bar for a vessel. It was a temporary cause, and, although I do not think the master would have been obliged, if the time had been the commencement of winter, to wait the whole winter, I think that, considering it was at a time when the weather was improving, the case is different, and that in substance the word "inaccessible" means inaccessible within a reasonable time after the ship arrives off the port and endeavours to get in. So far, I do not think there is very much difficulty. But we come to the words as to which, in my judgment, there is difficulty, viz., "or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice"—the provision for discharge on the ice possibly applies to the whole clause; it may apply to inaccessibility on account of ice—"or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship's responsibility shall cease." In order to justify delivery at another port the circumstances must be within the words "should entry and discharge at a port be deemed by the master unsafe," and unsafe "in consequence of war, disturbance or any other cause." The words deal with entry and discharge at a port; it is not in the course of the voyage that the master is to judge of the safety. In the present case the vessel had got within forty miles of Vladivostock, and if the circumstances came within the clause in other respects I do not think it could be said that the entry and discharge at the port was not a matter that the master was to deal with. But the real question is whether, in order that the clause may apply, the entry and discharge must not be deemed by the master unsafe in consequence of some cause ejusdem generis with war and disturbance. I do not think that ice is, or that perils of the sea are, generally ejusdem generis with war or disturbance. The rule that general words are to be read as ejusdem generis with particular ones is very difficult to

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Channell J.

apply, and, although Mr. Hamilton, on behalf of the plaintiffs, has said that he does not recollect any authority in which the rule has been altogether disregarded, it has been stretched a good deal in recent cases. In the present case, looking at the whole matter, I am of opinion that I ought to apply the rule, and that, as war and disturbance is something totally different from that which happened, I must decide in favour of the plaintiffs. I ought perhaps to say that I do not in any way doubt the master's bona fides. I do not doubt that he had, to some extent, the safety of the vessel under his consideration. But the paramount consideration in his mind, I have not the slightest doubt, was the delay further attempts to get into the port would cause; and the real difficulty in this case is in determining whether the master ought not to have waited a little longer. There is always a difficulty in judging after the event. We know now, after the event, that if the master had waited another day he would have got into the port; but it is not fair to rely upon that. Regard must be had to his judgment at the time. I feel sure that the delay which would result from waiting longer was the real matter in his mind. I do not see that there was any real danger in his waiting. It may be that there would have been danger in waiting more than three or four days longer, because of the want of coal; but he had plenty of coal on board to wait three or four days more. The danger that he apprehended, so far as he was apprehensive of danger, was that which might arise from his forcing his way through the ice. The question is whether he ought not to have waited two or three days longer, when, as events turned out, he would not have had to force his way through at all, but would have got through quite easily. It is very difficult to decide whether the master, in exercising his judgment, was influenced by the question of delay only and not by that of safety, and I do not wish to base my judgment upon my view on that question. I base it upon the ground that the ejusdem generis rule applies, that there is nothing in this contract which makes the judgment of the master, in reference to the safety or otherwise of the ship from perils of the sea or ice, binding upon the plaintiffs. Under the contract his judgment is made binding only in case of war or

disturbance or something of that character, which is something altogether different from ice.

On that ground I give my judgment for the plaintiffs.

Judgment for plaintiffs.

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TILLMANNS & CO. *v.* SS. KNUTSFORD, LIMITED.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *W. A. Crump & Sons.*

J. E. A.

TRUSTEE OF THE PROPERTY OF F. LORD (A BANKRUPT) *v.* GREAT EASTERN RAILWAY COMPANY.

1907

Nov. 12, 13, 14.

Bill of Sale—Agreement for Ledger Account with a Trader—General Lien for carriage of Goods—Licence to take Possession—Tenancy—Bankruptcy of Trader—Damages for Trespass and causing Bankruptcy—Cause of Action passing to Trustee—Mutual Dealings—Set-off—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

A railway company let to a coal merchant certain land at a monthly rental for stacking coal unloaded from trucks on the company's railway sidings. The land adjoined the sidings and was within the company's railway yard, the gates of which were closed during the night. By an agreement between the company and the coal merchant the latter agreed to open in their ledger a monthly credit account with the coal merchant for the carriage of coal upon the condition that they should have a lien upon all waggons, goods, minerals, &c., conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggons, goods, minerals, &c., in order to satisfy the lien; and the company reserved the right to close the account upon giving one day's notice of their intention so to do, whereupon the whole of the account was to become due. The account being in arrear, the company gave notice and closed the account, and took possession of the coal in the trucks on the sidings and also the coal and other goods on the land. The coal merchant was shortly afterwards adjudicated bankrupt. His trustee in bankruptcy brought an action against the company for wrongfully trespassing and seizing the coal and other goods, alleging that the agreement was a bill of sale and void for non-registration, and that the act of the company stopped the business and brought about the bankruptcy:—

Held, that the agreement was not a bill of sale, and therefore that the plaintiff could not recover.

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Spencer v. *Midland Ry. Co.*, (1895) 11 Times L. R. 408, 542, followed.

Held, also, that, even if the company's acts were not justified in law, the damages claimed for the trespass and for causing the bankruptcy were in respect of a cause of action personal to the bankrupt which did not pass to his trustee in bankruptcy.

Held, also, that the company could not have set off the debt due to them for carriage of coal against any damages the trustee might have recovered, as it was not a case of mutual dealings within s. 38 of the Bankruptcy Act, 1883.

THIS was an action that raised (inter alia) the question whether the ledger agreement, under which the defendant company had opened a monthly credit account with the bankrupt for the carriage of his goods, was a bill of sale and void for non-registration, under these circumstances.

For some years prior to his bankruptcy one F. Lord carried on business at Norwich as a coal merchant. By four written agreements between the years 1902 and 1904 the company let to Lord certain plots of land called "allotments," at their Norwich Victoria Station, at monthly rentals. These allotments adjoined the railway sidings of the company, and were used by Lord as a depot for stacking coal unloaded from trucks standing in the sidings. In 1902 the company also let to Lord an office at Norwich Victoria Station, whereby he agreed that he would during the continuance of the tenancy pass over the company's railway a minimum of 10,000 tons of coal traffic per annum under a penalty, but subject to an average clause. By another agreement dated February 19, 1903, the company at Lord's written request opened in his name in their ledger at Doncaster Station a monthly credit account for the carriage of coal upon the following (amongst other) conditions, viz.: "(3.) The company to have a continual lien upon all waggons, goods, minerals, articles, and things hauled or conveyed on their lines, or which shall be at any time upon the railway or upon any ground allotted by or rented of the company, for all tolls, rates, charges, and moneys which shall be or become due or payable to the company, as well as in respect of the particular waggons, goods, minerals, articles, or things which from time to time may be so carried as in respect of all waggons, goods, minerals, articles, and things which shall at any time have been hauled or conveyed

along or be upon the railway, or any part thereof, and the company to be at liberty from time to time and in such manner as they shall think fit to sell and dispose of all or any of such waggons, goods, minerals, articles, and things in order to satisfy such lien. (4.) The company reserve to themselves the right to close the account at any time upon giving one day's notice in writing of their intention so to do, whereupon the whole of such account shall become immediately payable. (5.) The company's coal ledger accounts are made up monthly to the last day of each month, they are sent from the London office by the 15th of the following month, and must be paid in full before the 26th of that month." This agreement for a ledger account was the printed common form used by the company in all such cases, and is hereafter referred to as the ledger agreement. In September, 1906, Lord's account under the ledger agreement was considerably in arrear, and it was verbally arranged between him and the mineral manager of the company that these arrears and accruing charges should be paid on a system of instalments, the first of such instalments (211*l.*) to be paid on October 10 following, and he was informed that if the instalment (211*l.*) was not paid the company would "shut him up." The instalment was not paid, and thereupon the company gave Lord written notice that, if the instalment was not paid by October 13, his ledger account would be closed. The instalment was not paid, and on October 15 the company closed Lord's ledger account. The same day the company, purporting to act under the ledger agreement, locked the gates leading to the allotments and took possession of—(*a*) 378 tons of coal on the allotments, as well as all the business plant, consisting of coal trolleys, sacks, weighing machines, rakes, and numerous other articles; and (*b*) 270 tons in trucks belonging to Lord, and which were on the railway sidings. On October 18 Lord called a meeting of his creditors, with the result that he filed his own petition and was adjudicated bankrupt on November 15, and the plaintiff became the trustee of his estate. On January 7, 1907, the company abandoned their claim to the plant, but still claimed the coal, and on January 12 this action was commenced. The plaintiff by his statement of claim alleged that the company acted

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wrongfully in locking the gates and trespassing upon and taking possession of the bankrupt's allotments and goods, which completely stopped the further carrying on of the bankrupt's business; that the ledger agreement operated as a bill of sale, and was void for non-registration under ss. 4 and 10 of the Bills of Sale Act, 1878, and (paragraph 7), "By reason of the premises the bankrupt suffered injury to his property and estate. He was kept out of possession of his land, he lost his goods and chattels, i.e., the plant, he was prevented from further carrying on and was compelled to stop his business. His credit was ruined and the goodwill of his business was destroyed, and he was compelled to call his creditors together and to suspend payment"; and that the bankrupt's right of action in respect of the premises was vested in the plaintiff as the trustee of his property. And the plaintiff claimed—(1.) damages for the trespass to the bankrupt's land; (2.) 500*l.*, the value of the coal; and (3.) a declaration that the goods and plant in question formed part of the estate of the bankrupt and passed to the plaintiff as his trustee free from any claim of lien or other security of the company. By their defence the company traversed the allegation of the plaintiff, and justified their acts on October 15 under the ledger agreement, and they alleged that Lord was in financial difficulties in July, 1906, and his bankruptcy was inevitable in October and was not caused by their closing his ledger account. They also alleged (as the fact was) that he then owed them 1138*l.* for carriage of coal, and they claimed to set off that sum against the sum (if any) that the plaintiff might recover against them. The action was tried with a special jury, and it was conceded that the liability (if any) of the company turned mainly on the construction of the ledger agreement; and it was agreed that, assuming the company's acts were not justified in law, 520*l.* was the value of the coal and 25*l.* the damages for the detention of the plant. On the same assumption the following issues were left by the judge to the jury, viz.: (1.) Did the acts of the company bring about the bankruptcy of Lord? If so, what damages? (2.) If not, then what damages for the trespass? The jury gave a verdict of 150*l.* damages on the first point, but gave no verdict on the second point, as they thought it did not

arise. To prevent difficulties the parties then agreed that, on the same assumption, 50*l.* should be the damages for the trespass. The questions of law were then argued.

Reed, K.C., and *F. Mellor*, for the trustee. The ledger agreement is a bill of sale. It is either a power or licence to take possession of personal chattels as security for a debt, or it is an agreement by which a right in equity to personal chattels or to a charge or security thereon is conferred, within the meaning of s. 4 of the Bills of Sale Act, 1878. The defendants may rely on *Spencer* v. *Midland Ry. Co.* (1), but it is distinguishable. In that case there was not, as here, a demise of land to the trader. But even if the agreement is not within the mischief of the Act, still the acts of the defendants were unauthorized. No doubt they had a particular lien for the carriage of the coal in the trucks on the sidings, but no rent was in arrear, and there was nothing in the agreement which entitled them to enter upon the allotments and take possession of the coal or of the plant or to close the yard. That was a trespass which absolutely stopped the business and caused loss to the bankrupt's estate distributable amongst his creditors, and gave rise to a cause of action which passed to the trustee in bankruptcy, and the damages are not too remote: *Stanton* v. *Collier* (2); *Kellaway* v. *Bury*. (3)

Scrutton, K.C., and *F. H. Coller*, for the defendants. The defendants are protected by the ledger agreement, which is not a bill of sale, and is within the principle of *Spencer* v. *Midland Ry. Co.* (1) and *Morris* v. *Delobbel-Flipo*. (4) The agreement covers the coal on the allotments as well as in trucks and the plant within the yard. The intention is that the defendants shall have a general lien on all goods when they come into the possession of the company, which shall continue until the goods have left the yard. This disposes of all the items of damage. But if the defence fails on any one of these items, the damages are too remote. The bankruptcy was not the natural consequence of the defendant seizing the goods, but the state of the bankrupt's business, which was insolvent. It is only the

(1) 11 Times L. R. 408, 542.
(2) (1854) 23 L. J. (Q.B.) 116.
(3) (1892) 66 L. T. 599, 601.
(4) [1892] 2 Ch. 352.

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direct pecuniary damage that can be recovered: *Hodgson* v. *Sidney*. (1) But if the damages are not too remote, the trustee cannot recover them. The essential cause of the damages claimed is personal injury to the bankrupt, because he was deprived of the possession of his goods and prevented from carrying on his business. That is a cause of action that does not pass to his trustee: *Rose* v. *Buckett* (2); *Brewer* v. *Dew*. (3) Lastly, if there is any item on which the trustee can recover, it is submitted that the company can set off against it the debt of 1138*l*. which the bankrupt owes them for the carriage of goods: *Peat* v. *Jones* (4); *Jack* v. *Kipping*. (5)

Reed, K.C., in reply. There can be no set-off: *Courage* v. *O'Shea* (6); *In re Mid-Kent Fruit Co.* (7) This is not a case of mutual dealings within the meaning of s. 38 of the Bankruptcy Act, 1883.

PHILLIMORE J. In this case the plaintiff's claim depends entirely upon the fact that the lien, or the supposed lien, conferred by the ledger agreement between the railway company and the bankrupt, for whom the plaintiff is trustee, either gives no right, or, by reason of its purporting to give a right, is bad under the Bills of Sale Act. I am of opinion that on this point, which goes to the root of the case, the plaintiff is wrong and the defendants are right. The case of *Spencer* v. *Midland Ry. Co.* (8) does not cover this case in every respect, but it does cover it on several points, and the principle upon which it proceeds, which is like the principle of the cases under builders' contracts, seems to me to go the whole length of this case. If this ledger agreement was a licence to seize chattels by way of security for a debt, it would be bad; but it proceeds on the footing that the railway company have already possession in some form or other, or to some degree or other, of the chattels which they are claiming to hold for their debt. I agree with the plaintiff that it is an unusual form of possession, and

(1) (1866) L. R. 1 Ex. 313.
(2) [1901] 2 K. B. 449.
(3) (1843) 11 M. & W. 625.
(4) (1881) 8 Q. B. D. 147.
(5) (1882) 9 Q. B. D. 113.
(6) [1895] 1 Ch. 325.
(7) [1896] 1 Ch. 567.
(8) 11 Times L. R. 408.

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that, at any rate as regards certain of the articles, it is an extension of the doctrine of possession. Perhaps the right way of looking at it is that the decision in *Spencer* v. *Midland Ry. Co.* (1) shews that, for the purpose of meeting the Bills of Sale Act, parties may agree that certain physical powers of detention or circumscription shall amount to possession so as to give the creditor a lien. In this case, as regards the trucks which were on the railway, it seems to me clear that the railway company could at any moment interfere with their being touched. That covers those trucks and the coal in those trucks. With regard to the coal on the allotments and the plant which were upon the railway ground, it is true they must be deemed to have been on the railway ground with the licence of the railway company, and in aid of the demise by the railway company of the allotments for stacking coal; but, on the other hand, they are within the gates of the railway company's yard, and within the control of the railway company, which can and does shut its gates at certain hours of the night and day; and it seems to me that, within the principle of *Spencer* v. *Midland Ry. Co.* (1), the railway company may be said to have possession of them or to be entitled to assert possession of them. With regard to the coal on the allotments the case is not quite so strong. But that coal can only be got by the introduction of waggons over the railway company's ground, and those waggons, eundo, morando et redeundo, would be liable to the railway company's lien; and, having regard to those facts, and to the fact that these allotments are again within the limits of the defendants' railway yard, I think the railway company may be said, by contract between the parties, to have had such possession of them as to enable them to say that they were not seizing the goods when they enforced their lien. Another way of putting it has been well stated by counsel for the defendants, that the effect of the contracts, not only the ledger contract, but the demising contracts, between the railway company and the bankrupt amounts to this, that they are all subsidiary and ancillary to the contract for carriage; and for this purpose the bailment of the railway company is not to be deemed to be over till the coal is taken outside

(1) 11 Times L. R. 408.

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the railway yard. That being the case, I think the whole ground of this action fails. Three other points have been raised, which I think it would be useful that I should deal with, at any rate to a certain extent. By agreement between the parties, or by the findings of the jury, there are two sums certain and two alternative sums which the plaintiff might recover from the defendants. He might recover 520*l.* for the coal seized, or a proportionate part of that sum if he could only recover in respect of the coal on the allotments or the coal in trucks. He might recover 25*l.* for the temporary detention of the plant seized, and he might recover 150*l.* because of the fact of the bankrupt being driven into bankruptcy, or, alternatively, 50*l.* for damages for the trespass on the bankrupt's land. Now, with regard to the 520*l.* and the 25*l.*, subject to the possible division of the 520*l.*, they stand upon one ground, and the answer to them is one only, namely, that the contract of lien is good, and that the railway company can justify the seizure because of the lien for the debt to them. If that ground fails, the next answers do not apply. With regard to the 150*l.*, I have to consider whether the claim is not too remote; and with regard to the 150*l.*, and possibly the 50*l.*, I have also to consider whether it is a claim which would accrue to the trustee. Now I do not propose to decide whether the claim for the 150*l.* is too remote or not. I do not think it is contended that the 50*l.* is too remote. But I do not propose to decide whether the claim for the 150*l.* is too remote or not, for this reason. In my opinion, if it is not too remote, it is a claim which the bankrupt, and the bankrupt only, can avail himself of. If it is good, it is a claim personal to the bankrupt—that is to say, it is a claim for personal injury to the bankrupt. It was put before the jury as a case in which damages might be given by reason of the high-handed conduct of the railway company. If it is anything, it is a claim for vindictive damages within the meaning of Collins L.J.'s judgment in *Rose* v. *Buckett*. (1) The damages would be not merely compensation for damage to land or goods, but something more, and, so far as they are more, they are of the character of vindictive damages in the legal sense, and, therefore, they remain in the bankrupt

(1) [1901] 2 K. B. 449.

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and do not pass to his trustee in bankruptcy. Upon the whole, I am of opinion that the same answer applies to the claim for the 50*l.* It is a claim for the temporary trespass to the goods of the bankrupt in the sense that the bankrupt was for the time deprived of the temporary use of them, and, as explained in the cases, it is an extension of the doctrine of trespass to the person, and the damages so ascertained (remembering always that separate sums have been granted for the actual detention of the plant and for the conversion of the coal) must be taken to be merely damages for the temporary deprival of the bankrupt's use of his own chattels. As I have said in the course of the case, there is no claim here of detinue; it is a claim either for conversion or for temporary detention of the goods. So far as it is a claim for conversion it is met by the findings in respect of the 520*l.* and the 25*l.*, and the only thing which remains is the personal annoyance and discomfort and injury which the bankrupt suffered by reason of being kept out of the use and enjoyment of his goods. Therefore I am of opinion that, as regards the 50*l.* as well as the 150*l.*, the cause of action, if any, would remain with the bankrupt and not accrue to the trustee. The last point raised by the defendants is that, even supposing the plaintiff could recover, they have a right of set-off which is a good defence to the plaintiff's claim. In this respect I think the defendants are wrong. It is not, strictly speaking, a set-off, and I do not think that this case is one of mutual credit or mutual dealings within s. 38 of the Bankruptcy Act, 1883. I think that the claim of the plaintiff, if it was a good one, arose from the detention of the bankrupt's goods. The claim of the defendants arose before the detention of the bankrupt's goods for carriage of these goods and many other things not the subject-matter of this action at all. I think that the claim of the defendants is anterior in time to the claim of the plaintiff, and does not arise out of the same transaction, though to a certain extent, and a certain extent only, it is connected with the same goods. Therefore I think that this defence would not have availed the defendants. But on the two grounds—first, that the ledger agreement is good and not bad under the Bills of Sale Act, and is available as a justification of the defendants' action; and,

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secondly, as regards the claim for 150*l.* and 50*l.*, that the cause of action, if any, would have survived to the bankrupt and not accrued to the trustee—I think that the defendants are entitled to have the verdict entered for them and judgment given for them, which I now give with costs.

Solicitors: *Tarry, Sherlock & King, for E. E. Blyth, Norwich; E. Moore.*

H. L. F.

1907

Dec. 9.

In re JONES.
Ex parte OFFICIAL RECEIVER.

Bankruptcy—Special Manager—Default in accounting—Four-day Order—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 12; *s.* 102, *sub-s.* 5—*Bankruptcy Rules*, 1886, *r.* 344.

The Court has jurisdiction under sub-s. 5 of s. 102 of the Bankruptcy Act, 1883, to make a four-day order for accounts against a special manager of a debtor's business appointed by an official receiver under s. 12 of the Act.

THIS was an application for a four-day order against the special manager of the debtor's business under these circumstances.

On February 5, 1907, a receiving order was made against the debtor. The next day the official receiver, under s. 12 of the Bankruptcy Act, 1883, appointed one Oswald special manager of the debtor's business to act until the trustee was appointed. On April 13 the trustee was appointed. Subsequently Oswald, though frequently applied to by the official receiver to render an account of his receipts and payments as special manager, neglected to do so. The official receiver and the trustee now applied that Oswald might be ordered to file his accounts within four days.

Hansell, for the application. Such an order has never before been made against a special manager, and there is a doubt about the jurisdiction. Under s. 12 of the Bankruptcy Act the official receiver has power to appoint a special manager of the debtor's business to act until the trustee is appointed, and by r. 344 of

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JONES, *In re.* OFFICIAL RECEIVER, *Ex parte.*

the Bankruptcy Rules, 1886, the special manager is to account to the official receiver. It is submitted, however, that the order can be made under sub-s. 5 of s. 102 of the Act, which provides that where default is made by a trustee, debtor, "or other person," in obeying any order or direction given by the Board of Trade or by an official receiver under any power conferred by the Act, the Court may order such defaulting trustee, debtor, "or other person" to comply with the order or direction so given.

The respondent did not appear.

PHILLIMORE J. This is a novel application, but I think that under sub-s. 5 of s. 102 of the Act there is jurisdiction to make the order in a proper case. On the evidence I think this is a proper case. You may take the order, and the respondent must pay the costs of the application.

Solicitor: *Solicitor to the Board of Trade.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

1907

Oct. 18.

MORRIS & BASTERT, LIMITED *v.* LOUGHBOROUGH CORPORATION.

Statute, Construction of—Statutory Power to make Contract for supply of Electricity—Penalty for Default in supplying Electricity when required—Breach of Contract, Remedy for—Whether Action lies—Loughborough Corporation Act, 1899 (62 & 63 *Vict. c. cxcvii.*), *ss.* 62, 65.

Where by statute contractual rights are conferred, clear words are required in the statute in order to place a limitation upon those contractual rights.

By s. 65 of the Loughborough Corporation Act, 1899, the corporation was empowered to make agreements with regard to a supply of electrical energy to consumers, and by s. 62 the corporation was made liable to a penalty for default in supplying energy to any owner or occupier of premises to whom they might be and were required to supply energy under the Act. The plaintiffs, who were not entitled to require a supply under the Act, made an agreement with the corporation for a supply of electrical energy:—

Held, that an action would lie at the suit of the plaintiffs against the

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corporation to recover damages for an alleged breach of the agreement to supply electrical energy, there being no clear words in the statute confining the remedy of the plaintiffs to proceedings to recover the penalty under s. 62 of the statute.

APPEAL by the plaintiffs, Messrs. Morris & Bastert, Limited, from a judgment of Bigham J.

The action was brought to recover damages for breach of contract.

The plaintiffs were engineers carrying on a large business at Loughborough, and the defendants were authorized by the Loughborough Corporation Act, 1899 (1), to supply electricity

(1) Loughborough Corporation Act, 1899 (62 & 63 Vict. c. cxcvii.), s. 43: "Except where otherwise expressly provided this part of this Act shall be read and construed subject in all respects to the provisions of the Electric Lighting Acts 1882 and 1888 and of any other Acts or parts of Acts incorporated therewith and those Acts and parts of Acts are in this part of this Act collectively referred to as 'the principal Act' and the several words terms and expressions to which by the principal Act meanings are assigned shall have in this part of this Act the same respective meanings provided that in this part of this Act . . . .

"The expression 'distributing main' shall mean the portion of any main which is used for the purpose of giving origin to service lines for the purposes of general supply;

"The expression 'general supply' shall mean the general supply of energy to ordinary consumers but shall not include the supply of energy to any one or more particular consumers under special agreement;

"The expression 'area of supply' shall mean the area within which the undertakers are for the time being authorized to supply energy under the provisions of this part of this Act; . . . .

"The expression 'consumer' shall mean any body or person supplied or entitled to be supplied with energy by the undertakers; . . . ."

Sect. 46: "Subject to the provisions of this part of this Act and the principal Act the undertakers may supply energy within the area of supply for all public and private purposes as defined by the principal Act, provided as follows:—

"(1.) That energy shall be supplied only by means of some system approved in writing by the Board of Trade and subject to the Board of Trade regulations; and

"(2.) The undertakers shall not without the express consent of the Board of Trade place any electric line above ground except within premises in the sole occupation or control of the undertakers and except so much of any service line as is necessarily so placed for the purpose of supply; and

"(3.) The undertakers shall not permit any part of any circuit to be connected with earth except so far as may be necessary for carrying out the provisions of the Board of Trade regulations unless the connexion is for the time being approved of by

within certain limits mentioned in the Act. The plaintiffs were the owners and occupiers of premises situated within the limits

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the Board of Trade with the concurrence of the Postmaster-General and is made in accordance with the conditions (if any) of that approval."

Sect. 56, sub-s. 1: "The undertakers shall within a period of two years after the passing of this Act lay down suitable and sufficient distributing mains for the purposes of general supply throughout every street or part of a street specified in that behalf in the Second Schedule and shall thereafter maintain those mains."

Sub-s. 2: "In addition to the mains hereinbefore specified the undertakers shall at any time after the expiration of eighteen months after the passing of this Act lay down suitable and sufficient distributing mains for the purposes of general supply throughout every other street or part of a street within the area of supply upon being required to do so in manner provided by this part of this Act:

"All such mains as last above mentioned (unless already laid down) shall be laid down by the undertakers within six months after any requisition in that behalf served upon them in accordance with the provisions of this part of this Act has become binding upon them or within such further time as may in any case be approved by the Board of Trade."

Sub-s. 3: "When any such requisition is made in respect of any street not repairable by the local authority which is not specified in the Third Schedule the undertakers shall (unless the authority or person by whom that street is repairable consent to the breaking up thereof) forthwith apply to the Board of Trade under section thirteen of the Electric Lighting Act 1882 for the written consent of the Board authorizing and empowering the undertakers to break up that street and the requisition shall not be binding upon them if the Board of Trade refuse their consent in that behalf."

Sect. 58: "Any requisition requiring the undertakers to lay down distributing mains for the purposes of general supply throughout any street or part of a street may be made by six or more owners or occupiers of premises along that street or part of a street.

"Every such requisition shall be signed by the persons making it and shall be served upon the undertakers.

"Forms of requisition shall be kept by the undertakers at their office and a copy shall be supplied on application free of charge to any owner or occupier of premises within the area of supply and any requisition so supplied shall be deemed valid in point of form."

Sect. 60: "The undertakers shall upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers in which they are for the time being required to maintain or are maintaining a supply of energy for the purposes of general supply to private consumers under this part of this Act or the Board of Trade regulations give and continue to give a supply of energy for those premises in accordance with the provisions of this part of this Act and of the said regulations and they shall furnish

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of supply, but were not entitled to require a supply under the Act, inasmuch as their premises were not situated within fifty

and lay any electric lines that may be necessary for the purpose of supplying the maximum power with which any such owner or occupier is entitled to be supplied under this part of this Act subject to the conditions following (that is to say):—

"The cost of so much of any electric line for the supply of energy to any owner or occupier as may be laid upon the property of that owner or in the possession of that occupier and of so much of any such electric lines as it may be necessary to lay for a greater distance than sixty feet from any distributing main of the undertakers although not on that property shall if the undertakers so require be defrayed by such owner or occupier:

"Every owner or occupier of premises requiring a supply of energy shall serve a notice upon the undertakers specifying the premises in respect of which the supply is required and the maximum power required to be supplied and the day (not being an earlier day than a reasonable time after the date of the service of the notice) upon which the supply is required to commence; and

"If required by the undertakers enter into a written contract with them to continue to receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the supply at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary customers within the area of supply shall not be less than twenty per centum per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of the supply and if required by the undertakers give to them security for the payment to them of all moneys which may become due to them by the owner or occupier in respect of any electric lines to be furnished by the undertakers and in respect of energy to be supplied by them:

"Provided always that the undertakers may after they have given a supply of energy for any premises by notice in writing require the owner or occupier of those premises within seven days after the date of the service of the notice to give to them security for the payment of all moneys which may become due to them in respect of the supply in case the owner or occupier has not already given that security or in case any security given has become invalid or is insufficient and in case any such owner or occupier fail to comply with the terms of the notice the undertakers may if they think fit discontinue to supply energy for the premises so long as the failure continues:

"Provided also that if the owner or occupier of any such premises as aforesaid uses any form of lamp or burner or uses the energy supplied to him by the undertakers for any purposes or deals with it in any manner so as to interfere unduly or improperly with the efficient supply of energy to any other body or person by the undertakers the undertakers may if they think fit discontinue to

yards from any distributing main as required by s. 60 of the Act.

By a contract in writing dated January 18, 1904, and under

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supply energy to those premises so long as that user continues:

"Provided also that the undertakers shall not be compelled to give a supply of energy to any premises unless they are reasonably satisfied that the electric lines fittings and apparatus therein are in good order and condition and not calculated to affect injuriously the use of energy by the undertakers or by other persons:

"If any difference arises under this section as to any improper use of energy or as to any alleged defect in any electric lines fittings or apparatus that difference shall be determined by arbitration."

Sect. 62: "Whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this part of this Act they shall be liable in respect of each default to a penalty not exceeding forty shillings for each day on which the default occurs.

"Whenever the undertakers make default in supplying energy in accordance with the terms of the Board of Trade regulations they shall be liable to such penalties as are prescribed by the regulations in that behalf:

"Provided that the penalties to be inflicted on the undertakers under this section shall in no case exceed in the aggregate the sum of fifty pounds in respect of any defaults not being wilful defaults on the part of the undertakers for any one day and provided also that in no case shall any penalty be inflicted in respect of any default if the Court are of opinion that the default was caused by inevitable accident or force majeure or was of so slight or unimportant a character as not materially to affect the value of the supply."

Sect. 63: "The undertakers may charge for energy supplied by them to any ordinary consumer (otherwise than by agreement)—

"(1.) By the actual amount of energy so supplied; or

"(2.) By the electrical quantity contained in the supply; or

"(3.) By such other method as may for the time being be approved by the Board of Trade:

"Provided that where the undertakers charge by any method so approved by the Board of Trade any consumer who objects to that method may by one month's notice in writing require the undertakers to charge him at their option by the actual amount of energy supplied to him or by the electrical quantity contained in the supply and thereafter the undertakers shall not except with the consumer's consent charge him by any other method:

"Provided also that before commencing to supply energy through any distributing main for the purposes of general supply the undertakers shall by public advertisement give notice by what method they propose to charge for energy supplied through that main and where the undertakers have given any such notice they shall not be entitled to change that method of charging except after one month's notice of

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the common seal of the plaintiffs and defendants respectively, the defendants agreed to supply electrical energy to the plaintiffs.

The agreement (so far as material) was as follows:—

"Whereas the corporation are under the provisions of the Loughborough Corporation Act 1899 the underwriters for the supply of electrical energy within the said borough . . . . and they are about to install the necessary plant for the supply of

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the change has been given by them to every consumer who is supplied by them from the main."

Sect. 65: "Subject to the provisions of this part of this Act and of the principal Act and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned the undertakers may make any agreement with a consumer as to the price to be charged for energy and the mode in which those charges are to be ascertained and may charge accordingly."

Sect. 102: "All penalties fees expenses and other moneys recoverable under this part of this Act or under the Board of Trade regulations the recovery of which is not otherwise specially provided for may be recovered summarily in manner provided by the Summary Jurisdictions Acts. Any penalty recovered on prosecution by any body or person or any part thereof may if the Court so direct be paid to such body or persons."

Sect. 164: "Proceedings for the recovery of any demand not exceeding fifty pounds made under the authority of this Act or any incorporated enactment whether provision is or is not made for the recovery in any specified Court or manner may be taken in the county court."

Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 3, sub-s. 3: "'Public purposes' shall mean lighting any street or any place belonging to or subject to the control of the local authority, or any church or registered place of public worship, or any hall or building belonging to or subject to the control of any public authority, or any public theatre, but shall not include any other purpose to which electricity may be applied."

Sub-s. 4: "'Private purposes' shall include any purposes whatever to which electricity may for the time being be applicable, not being public purposes, except the transmission of any telegram."

Sect. 10: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any licence, order, or special Act authorizing or affecting their undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply."

electrical energy within the said area under the powers conferred upon them by the said Act.

"And whereas the company are the owners and occupiers of certain premises situate within the said borough and they have applied to the corporation for a supply of electrical energy which the corporation have agreed to provide and supply and the company have agreed to take on the terms hereinafter mentioned as provided for by clause 65 of the above-mentioned Act:—

"1. The corporation will supply electrical energy (hereinafter referred to as the 'permanent supply') to the company on the thirtieth day of June one thousand nine hundred and four or as soon thereafter as they are able to do so but in any event the said permanent supply shall be given to the company not later than the first day of September one thousand nine hundred and four but the corporation shall not be liable to the penalties prescribed by section 62 of the said Act or any other penalties for any default in supplying energy before the said first day of September one thousand nine hundred and four. After the said first day of September one thousand nine hundred and four or such earlier date as the corporation commence the permanent supply to the company all electrical energy supplied by the corporation to the company shall be deemed to be permanent supply."

"4. The company shall subject to the provisions hereinafter contained in this and the next following clause take from the corporation after the commencement of the permanent supply the whole of the electrical energy required and used by them for any purpose in their existing works or any extension thereof or in any other works they may establish in the said borough during the continuance of this agreement. Provided nevertheless that the company shall be entitled at all times to use on their works such electrical energy as may be produced by the generating plant belonging to the company at present existing on their said works and shall be entitled to repair and renew the said plant from time to time."

"7. The rates to be charged by the corporation and paid by the company for the permanent supply shall be regulated by the actual amount of energy supplied and at the following rates:—"

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[Then followed the price per unit the company was to pay, the price per unit varying with the value of the total number of the Board of Trade units supplied during any one year.]

"11. The corporation shall at their own expense furnish and lay to a point at least six feet within the boundary of the company's premises such electric mains as may be necessary for supplying the maximum power to which the company are from time to time entitled under this agreement."

The plaintiffs, by their statement of claim, alleged that the contract was entered into, as the defendants well knew, for the purpose of supplying the plaintiffs with electrical energy in their business and for the purposes thereof.

They further alleged that about three o'clock in the afternoon of November 22, 1905, the defendants wholly neglected and failed to supply electrical energy in accordance with the contract, and such neglect and failure continued for a period of six hours from that time, and that by reason of the premises during the whole of the period of six hours the plaintiffs' works at which they carried on business were stopped, 200 of the plaintiffs' workmen were left idle and sent away, and the plaintiffs lost the profits otherwise obtainable from their business, and were seriously inconvenienced therein.

By their defence the defendants said (inter alia) that they would object that no action lay in the High Court of Justice in respect of the alleged neglect and failure. By virtue of s. 62 of the Loughborough Corporation Act, 1899, the only liability incurred by the defendants for neglect or failure to supply electrical energy was to a penalty not exceeding forty shillings a day, subject to the provisions in the section contained, and recoverable summarily in manner provided by the Summary Jurisdiction Acts, or in the alternative in the county court.

The points of law raised by the defence were ordered to be set down for argument, and the arguments took place before Bigham J.

Hugo Young, K.C., Danckwerts, K.C., and *W. Whately,* for the plaintiffs.

Montague Shearman, K.C., and *T. H. Walker,* for the defendants.

1906. Oct. 26. BIGHAM J. I am of opinion that s. 62 of the Loughborough Corporation Act, 1899, is intended to apply in all cases where, under the provisions of the Act, the corporation supplies energy. I do not think that it was intended to make any distinction between cases where the supply is under the ordinary provisions of the Act and cases where the price to be charged for the supply is, under s. 65, arrived at by virtue of an agreement. It would be extremely inconvenient if there were any such distinction, and I cannot think that the Legislature intended that there should be any, for if they had so intended I think that intention would have been expressed in plain terms. The action must be dismissed.

Judgment for defendants.

The plaintiffs appealed.

Danckwerts, K.C., and *W. Whately*, for the plaintiffs. The Loughborough Corporation Act, 1899, s. 43, specifically divides the supply of electricity into two classes, viz., general supply to ordinary consumers and supply to particular consumers under special agreement. That is clear from the definition of the expression "general supply" contained in s. 43. Sect. 56 relates to general supply only. Sects. 58 and 59 provide the machinery by which requisitions may be made with regard to distributing mains for the purposes of general supply. Sect. 60 applies only to streets where the corporation are required to maintain a general supply, and where there are premises within fifty yards from any distributing main. Sect. 62 is the penal section. The proviso to that section contemplates a number of persons in consimili casu making an application against the corporation for penalties. Sect. 63 regulates the methods of charging for electricity supplied, and s. 65 is the section which authorizes the corporation to make contracts for the supply. Sect. 102 shews that, apart from the direction of the Court, the prosecution is not entitled to any part of a penalty inflicted on the corporation. As the premises occupied by the plaintiffs were not within fifty yards from any distributing main, the corporation cannot be required to give a supply to the plaintiffs under s. 60 of the Act. *Clegg, Parkinson & Co.* v. *Earby Gas*

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Co. (1) and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2) are distinguishable. The decisions in those cases only shew that if persons obtain their supply under compulsory clauses of a statute, their remedy is limited to that given by the statute. In the present case there is no statutory obligation upon the defendants to supply the plaintiffs with electricity, but only an obligation arising out of contract. The only right the plaintiffs have to claim a supply is the ordinary contractual right. Sect. 46 gives express power to the defendants to supply all persons; that means by agreement. Under s. 43 of the Loughborough Corporation Act, 1899, expressions in Part III. of that Act are to have the same meanings as those assigned to them by the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), and by s. 3, sub-s. 4, of the Act of 1882 "private purposes" is to include any purposes whatever to which electricity may for the time being be applicable, not being public purposes, except the transmission of any telegrams. The defendants can therefore make contracts to supply electricity for any purpose except sending telegrams. If a contract cannot be enforced, it cannot in a business sense be made. [*Metropolitan Electric Supply Co.* v. *Ginder* (3) was also referred to.]

Montague Shearman, K.C., and *C. E. Dyer* (*T. H. Walker* with them), for the defendants. Part III. of the Loughborough Corporation Act, 1899, contains all the powers given by the statute with regard to electric lighting. In the present case the fact that the parties have agreed upon the amount of the charges to be made by the defendants does not cause the supply to be any the less a statutory supply. Sect. 62 of the Loughborough Corporation Act, 1899, is identical with s. 30, sub-ss. 1, 3 and 4, of the Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19). In s. 30, sub-s. 1, of that statute some word has been omitted in the phrase "may be and are required to supply." The phrase means "may be supplying and are required to supply." If it had been the intention of the Legislature that the penalties prescribed by s. 62 of the Loughborough

(1) [1896] 1 Q. B. 592. (2) (1877) 2 Ex. D. 441.
(3) [1901] 2 Ch. 799.

Corporation Act, 1899, should not apply to consumers by contract, express words to that effect would have been inserted in the statute. The language of s. 62 shews that that section was meant to apply to every case where there has been a failure on the part of the defendants to supply energy. They are liable to the penalty whenever they make default in supplying energy to any person to whom "they may be and are required to supply energy." The language is not limited to those persons to whom they make a "general supply." It is clear, therefore, from the definition of "general supply" contained in s. 43 that s. 62 is not limited to the general supply to ordinary consumers, but that it applies equally to persons to whom they supply by private contract. The operative part of s. 65 means that under s. 46 the defendants are given power to supply consumers, and then goes on to enable the parties to fix the price. By s. 43 "consumer" means "any body or person supplied or entitled to be supplied with energy." If parties enter into contracts under the Loughborough Corporation Act, 1899, they incorporate all the provisions of that statute. As soon as the defendants signed the agreement they were "required to supply energy"; and as soon as they were required to supply energy by the contract, they had agreed to make a supply to which s. 62 of the Act of 1899 applies.

LORD ALVERSTONE C.J. This case raises a very important question. We cannot consider Bigham J.'s decision without dealing with the much larger question as to how far a statutory provision as to penalties can control an agreement into which by statute there is power to enter. I quite agree with the contention on behalf of the defendants that if the true construction of the Loughborough Corporation Act, 1899, is that no agreement can be made by virtue of the power there given except subject to the provisions of s. 62—or, in other words, if because s. 65 (which is one of the sections relating to agreements) is in the same part of the statute as s. 62, therefore any agreement entered into under that part of the Act is subject to the provisions of both these sections—the agreement we have to consider would be controlled by the statute. But it seems to me that on general principles, where in a statute contractual rights are given to

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persons, clear words are required in the statute in order to place a limitation upon those contractual rights. The question is whether there are any sufficient words in the Loughborough Corporation Act, 1899, to deprive the plaintiffs of the contractual rights given to them by the statute. I am unable to see any limitations placed by the Act of 1899 upon the power to contract which would justify the defendants in saying that they are not liable for damages for breach of the agreement.

It must be remembered that the Loughborough Corporation Act, 1899, is a private Act. For the present purpose Part III., which comprises ss. 43 to 105 inclusive, may be treated as a private Act of Parliament with regard to electricity. The Electric Lighting Acts, 1882 and 1888, are incorporated, and, except where otherwise provided, the Loughborough Corporation Act, 1899, is to be read and construed subject to the provisions of those Acts. Sect. 10 of the Electric Lighting Act, 1882, provides that "the undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade . . . . and of . . . . any special Act . . . . and for the purpose of supplying electricity . . . . construct such works . . . . enter into such contracts . . . . and generally do all such acts and things as may be necessary and incidental to such supply."

That power to make contracts is clearly recognized in the provisions of the Loughborough Corporation Act, 1899, s. 43 of which provides that "The expression 'distributing main' shall mean the portion of any main which is used for the purpose of giving origin to service lines for the purposes of general supply. The expression 'general supply' shall mean the general supply of energy to ordinary consumers, but shall not include the supply of energy to any one or more particular consumers under special agreement." That section recognizes that there is a class of people, who are called "ordinary consumers," who are entitled to what is called the general supply of energy. A very large number of persons require light just as they require water, and electric light just as they require gas. A less, but still perhaps a considerable, number require what I may call small power, and would require to take the current

for that purpose. Sect. 46 of the Loughborough Corporation Act, 1899, reproduces the power to enter into contracts given under the Electric Lighting Act, 1882, with certain exceptions that are not material. Sect. 60 of the Loughborough Corporation Act, 1899, enables persons to call for a supply when they are within fifty yards of any distributing main in which the undertakers are required to maintain, or are maintaining, a supply of energy for the purposes of general supply to private consumers. That section does not apply to a supply of energy to one or more particular consumers under special agreement. By s. 62 a penalty is provided with regard to default in supplying persons who are owners or occupiers of premises to whom—that is, the persons to whom—the corporation "may be and are required to supply energy under this part of this Act." Ex concessis a person who is more than fifty yards from a distributing main is not a person whom the undertakers may be required to supply; therefore some limit is intended to be placed upon the operation of this section. The words "may be and are" present no difficulty to my mind; they have been similarly used in many other statutes. I think the words mean persons who are in a position to call for a supply, and are actually calling for a supply at the time that the question arises. The words are inserted for the protection of the corporation, and I see nothing upon the face of s. 62 to indicate that it was intended to apply to anything else except the supply which the corporation might be required to give. The persons who can require a supply are those indicated in s. 60, and they can ask for the electricity in accordance with the provisions as to general supply. Sect. 63, again, draws the distinction between supply to an ordinary consumer and supply by agreement. Sect. 65 gives a further right, which is really a protection to the consumer, viz., that, although the consumer may make an agreement, he is not, by making it, to be deprived of his right to require that he shall have the electricity charged for according to the method mentioned in the Act. I fail to see anything in the Loughborough Corporation Act, 1899, which entitles me to say that s. 62 of that Act was meant to limit the liability of the corporation in the case of ordinary breaches of contract, and I think, in such an important matter as

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interference with freedom of contract, that in this, as in very many other branches of our law, special words would be required to limit the rights of making contracts conferred by the Act.

[His Lordship then analysed the contract of January 18, 1904, and came to the conclusion that there was nothing in its terms which limited the right of the plaintiffs to make a claim for breach of contract in regard to failure of supply, and that the appeal must be allowed.]

BUCKLEY L.J. The question before the Court involves the determination of a point of law. By an agreement of January 18, 1904, the defendants agreed to make to the plaintiffs a certain supply of electricity. It was alleged that there was a breach on the part of the defendants of the agreement so entered into in that they made default in the electrical supply. An action was brought for damages for that breach of contract. The question is whether what would be prima facie the right of the plaintiffs to damages is excluded by the operation of s. 62 of the Loughborough Corporation Act, 1899. The relevant provisions of that Act are these. By s. 46 the defendants are empowered to supply electrical energy within a definite area. By ss. 56, 58 and 60 they are required to supply certain persons within that area. The manner in which that object is effected is this. Sect. 56, sub-s. 1, defines certain mains which are to be laid in certain scheduled streets. Sect. 56, sub-s. 2, coupled with s. 58, contains provisions under which, at the requisition of six or more owners of premises in a street, the defendants can be called upon to lay down mains in streets other than the scheduled streets. The supply made thus to the scheduled streets, or to what I may call the requisitioning streets, is "general supply." By s. 43 "general supply" is so defined as to exclude the supply of energy to particular consumers under special agreement. So far we have a class of persons to whom the defendants are bound to make supply. Sect. 65 empowers the corporation to make what s. 43 has called special agreements with persons who are not entitled to require supply, but who, lying within the area of supply, are persons to whom the corporation can, within their powers, make a supply.

The plaintiffs were not owners or occupiers of any premises situate (as mentioned in s. 60) within fifty yards of any distributing main laid under the provisions of s. 56, sub-s. 1, nor could they require a supply under s. 56, sub-s. 2; they were persons to whom, under the Loughborough Corporation Act, 1899, the defendants were not bound to make a supply. That was the state of facts when, on January 18, 1904, the defendants agreed that they would make them a supply.

By s. 62 of that Act it is provided that, "Whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this part of this Act," they shall be liable to certain penalties. It follows from what I have said that the plaintiffs were not persons to whom the corporation might be required or were required to supply. The plaintiffs were persons who had no right to require a supply, and had not required a supply, except that they were desirous of contracting under s. 65 with the corporation, if the corporation were minded—and they might have refused—to make them a supply by agreement. On behalf of the defendants it was contended that the words "may be and are required to supply energy under this part of this Act," contained in s. 62, include a supply under s. 65, inasmuch as s. 65 is in "this part of this Act." It is true that s. 65, which gives the power to contract, is included in "this part of this Act," but the right to the supply in the present case did not arise under the Act, but under the contract which was voluntarily entered into in pursuance of the power which was given by the Act. Therefore it is not within the language of s. 62. It seems to me, for these reasons, that s. 62 is not applicable to the case of persons in the position of the plaintiffs, who are persons to whom the corporation could not be and were not required to supply energy, but to whom they voluntarily agreed to give a supply. I am therefore of opinion that the action lies, and that the appeal must be allowed.

KENNEDY L.J. I am of the same opinion. With regard to s. 62 of the Loughborough Corporation Act, 1899, I am of opinion that the persons dealt with by that section with reference to

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penalties are persons to whom the undertakers may be and are required to supply energy. The plaintiffs never could, under the Act, require the corporation to supply energy. Moreover, if it had been the intention of the Legislature to include in s. 62 all persons mentioned in Part III. of the Act, which deals with electric lighting, it would have been so easy to say in s. 62: "Whenever the undertakers make default in supplying energy to any owners or occupiers of premises to whom they are supplying energy under this part of this Act." If it was intended to include all persons to whom the defendants supply electricity, it would have been easy to have avoided deviating from such a natural form of expression to one which specifies owners or occupiers to whom they may be and are required to supply energy, when the requisition for a supply is confined by earlier clauses, as Buckley L.J. has pointed out very fully, to certain persons in a category to which the plaintiffs do not belong.

Appeal allowed.

Solicitors for plaintiffs: *Ward, Perks & McKay.*

Solicitor for defendants: *F. Fitz-Payne, for H. Perkins, Town Clerk, Loughborough.*

J. E. A.

[IN THE COURT OF APPEAL.]

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OPPENHEIMER *v.* ATTENBOROUGH & SON.

Factor—"Mercantile Agent"—Authority to Pledge, Extent of—Custom of Particular Trade—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2,

The authority given by s. 2 of the Factors Act, 1889, to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them.

Decision of Channell J., [1907] 1 K. B. 510, affirmed.

Appeal by the plaintiff from the decision of Channell J. at the trial of the action without a jury. (1)

The action was brought by the plaintiff, a dealer in diamonds carrying on business at Holborn Viaduct, against the defendants, a firm of pawnbrokers in Fleet Street, to recover certain parcels of diamonds which were alleged to have been wrongfully pledged with the defendants for the sum of about 1200*l.*

It appeared from the evidence that the plaintiff had been from the year 1888 acquainted with a diamond broker named Schwabacher, who had previously been a member of a firm of diamond merchants, called Schwabacher Brothers, until that firm ceased to exist. Schwabacher had originally obtained advances from the defendants upon the security of diamonds pledged by him in the year 1898, when he was trading as a diamond merchant, and from that date until the transactions which gave rise to the present proceedings he had continued to pledge diamonds with the defendants from time to time, frequently taking out stones already in pledge and replacing them by others. In April, 1906, Schwabacher came to the plaintiff's office and asked the plaintiff to let him have some diamonds to shew to two firms of diamond merchants, whose names he gave, to whom he thought he could sell them. The plaintiff, relying upon Schwabacher's statement, let him have a number of diamonds, and gave him a

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commission note, in which he inserted the price at which the diamonds might be sold. Schwabacher did not shew the diamonds to either of the firms named by him, but pledged them with the defendants for an advance of money to himself, sending a note to the plaintiff to the effect that the diamonds were sold. These dealings were repeated on more than one occasion before the dishonesty of Schwabacher was discovered by the plaintiff, who, on the refusal of the defendants to give up the diamonds pledged with them, brought the present action. At the trial evidence was given by several diamond merchants and diamond brokers on behalf of the plaintiff to the effect that a diamond broker, employed to sell diamonds, had no authority to pledge them in order to obtain advances of money for his principal, and that it was an unheard-of thing in the trade to employ a broker to pledge diamonds.

Channell J. found upon the facts that the diamonds were in possession of Schwabacher, as a mercantile agent, with the consent of the plaintiff, and that the defendants had acted in the matter of the pledge with good faith; and he held that the general authority given by the Factors Act, 1889 (1), to a mercantile agent to pledge goods of which he is in possession with the consent of the owner is not restricted by the existence in a particular trade of a custom that a mercantile agent, employed in that trade to sell goods, has no authority to pledge them, and he gave judgment for the defendants. The plaintiff appealed.

(1) By 52 & 53 Vict. c. 45 (the Factors Act, 1889), s. 1, sub-s. 1: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

By s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Rawlinson, K.C., and *H. Dobb* (*Dunkels* with them), for the plaintiff. Assuming Schwabacher to be a mercantile agent, the pledges were not made by him "when acting in the ordinary course of business of a mercantile agent" within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889. It is clear from the evidence that in the diamond trade an agent for the sale of diamonds never has authority to pledge them, so that Schwabacher, when he pledged the diamonds, was not acting in the ordinary course of business of a diamond broker: *Hastings* v. *Pearson* (1); *Waddington* v. *Neale*. (2) The question depends, not on holding out, but on the actual authority which any particular mercantile agent has in the customary course of his business as such agent. It is a matter of evidence, and must depend on the facts of the case. The effect of the judgment of Channell J. is that any agent authorized to sell goods has power under this Act to pledge them. That is much too wide a decision. It would include, for instance, the case of an auctioneer; but it is obvious that the Legislature never intended that an auctioneer, entrusted with goods for sale, should have a statutory power of pledging them. The expression in s. 2, sub-s. 1, "when acting in the ordinary course of business of a mercantile agent," means "when purporting to act" as a mercantile agent. A man cannot act in the ordinary course of business of a mercantile agent, unless by speaking to the person he is dealing with, or in some other way, he lets that person know of his intention so to act. The object of the Act was to protect persons dealing with mercantile agents by relieving them from having to inquire into the limits of the agent's authority. That was the object of the Factors Act, 1842 (5 & 6 Vict. c. 39): *Cole* v. *North Western Bank* (3); and the Act of 1889 was passed to carry out what the judges there thought was the intention of the earlier Act, though the intention expressed by the preamble was not carried out by the enacting part of the Act. [They referred on this point to *Lamb* v. *Attenborough*. (4)]

The evidence before Channell J. shews that Schwabacher obtained possession of the diamonds from the plaintiff by what

(1) [1893] 1 Q. B. 62.
(2) (1907) 96 L. T. 786.
(3) (1875) L. R. 10 C. P. 354.
(4) (1862) 31 L. J. (Q.B.) 41.

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amounted to larceny by a trick. If so, he was not in possession of them "with the consent" of the owner within s. 2, sub-s. 1: see *Reg.* v. *Buckmaster* (1); Pollock and Wright on Possession in the Common Law, p. 218.

J. A. Hamilton, K.C., and *C. L. Attenborough*, for the defendants. The contention on behalf of the plaintiff is an attempt to substitute the words "business of such mercantile agent" instead of "business of a mercantile agent" in s. 2, sub-s. 1. It is true that s. 1, sub-s. 1, in defining the expression "mercantile agent," uses the expression "his business as such agent"; but that form of words has been deliberately changed in s. 2, sub-s. 1, in which mention is merely made of the business of "a" mercantile agent. That is quite a general expression. For the purposes of that sub-section the point is not as to the particular kind of business that the mercantile agent in question is engaged in. If he is "acting in the ordinary course of business of a mercantile agent," that is enough to confer a good title on the pledgee. The meaning of that expression is that the agent, in making the disposition, must act in the ordinary way in which a mercantile agent acts when he transacts business—that is to say, the business must be transacted within business hours and in a proper manner and place. In *Sheppard* v. *Union Bank of London* (2) it was held that the Act of 1842 did not require that the pledge should take place in the ordinary course of business. Sect. 2, sub-s. 1, means that a person shall not act in a private capacity: *Biggs* v. *Evans*. (3) The case of *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (4) shews that the changes in the law have been moving in the direction of making possession of goods sufficient to enable the possessor to transfer a title to a person taking in good faith. It is clear that, under the law as it stood at the time of the passing of the Factors Act, 1889, if the defendants proved that Schwabacher was entitled to the possession of the goods, they would have had the same protection as if he had been authorized to pledge them. The insertion of this expression in s. 2, sub-s. 1, cannot have been intended to cut down that protection. In *Waddington* v.

(1) (1887) 20 Q. B. D. 182.
(2) (1862) 7 H. & N. 661.
(3) [1894] 1 Q. B. 88.
(4) [1899] 1 Q. B. 643.

Neale (1) the agent had a specific authority given to him, and was not acting as a general mercantile agent. If the judgment of Channell J. were overruled, it would mean that "goods," as distinguished from "documents of title to goods," are to be taken altogether out of the operation of the Act. The definition of "pledge" in s. 1, sub-s. 5, shews that it was not the intention of the Legislature to confine the validity of the transaction to the case where the contract of pledging is one which the person is in the habit of making in the ordinary course of his business. [Boyd and Pearson on the Factors Acts, p. 73, Butterworth on Bankers' Advances on Mercantile Securities, and *De Gorter* v. *Attenborough* (2) were also referred to.]

Rawlinson, K.C., in reply. *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (3) has nothing to do with s. 2, sub-s. 1.

LORD ALVERSTONE C.J. In this case my brother Channell has decided in favour of the defendants, whom he has held to be protected by the Factors Act, 1889. It has been strenuously contended that the words "when acting in the ordinary course of business of a mercantile agent" were inserted in sub-s. 1 of s. 2 with the intention of imposing some limit upon the generality of previous legislation. I have carefully considered the argument of Mr. Hamilton, who pointed out the difference between the expression "course of his business" which is used in sub-s. 1 of s. 1 and the expression "course of business of a mercantile agent" in sub-s. 1 of s. 2, and I think that, unless we see our way very clearly, we ought not to hold that the words in sub-s. 1 of s. 2 were meant to deprive the pledgee of the protection given by former Acts, solely on the ground that the mercantile agent has acted in a way contrary to the custom of the particular trade, and contrary to the way in which his principal in the particular case intended him to act.

In this case evidence was tendered before Channell J.—and I will assume for the purposes of the case that it was practically uncontradicted—that in the diamond trade it was the custom that diamond merchants desirous of obtaining advances on diamonds

(1) 96 L. T. 786. (2) (1904) 21 Times L. R. 19.
(3) [1899] 1 Q. B. 643.

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did not do so through agents, but did the business themselves. It seems to be conceded by Mr. Rawlinson's argument that an express prohibition by a principal to his agent would not, if the agent pledged the goods in the course of business, be sufficient to deprive the pledgee of the protection given by the Act. I think that my brother Channell has taken a right view in holding that evidence of this custom was not admissible for the purpose of defeating the protection which otherwise is by the Act given to a pledgee.

When you are dealing with a person who is a mercantile agent, you have to find out whether in the customary course of his business as such agent he has authority to sell or consign for sale or buy or raise money on goods. It is clear, therefore, why the words "in the customary course of his business as such agent" were inserted in sub-s. 1 of s. 1 of the Factors Act, 1889. There are many kinds of agents who receive possession of goods, such, for instance, as carriers, and yet it is no part of the customary course of business of such agents to sell them or consign them for sale or raise money on them. Therefore, when you are dealing with an agent in possession of goods, you have, no doubt, to consider what kind of agent he is, and what his customary course of business would be when he is acting in the capacity of agent. Mr. Rawlinson pressed upon us the case of an auctioneer, which is undoubtedly one of some difficulty. He suggested that under sub-s. 1 of s. 2, unless it be read as he wishes to read it, an auctioneer would have power to pledge goods entrusted to him for sale. It seems to me that there may be particular agents, such as auctioneers, with regard to whom a pledge by them of goods entrusted to them would be such a departure from the ordinary course of their business as to put the pledgee upon notice. No question of that kind arises in this case. Having got the class of mercantile agents whose transactions are to be validated in the interests of a pledgee, as contemplated by the preamble of the Factors Act, 1842, we come to sub-s. 1 of s. 2, which deals with the circumstances under which the transaction must be carried out. I think that the sub-section means that the transaction is to be validated, if the agent has acted in the transaction as a mercantile agent would act.

That, no doubt, includes limits that have been suggested, such as that the sale, or whatever the transaction is, must not take place outside business hours, or under circumstances under which a mercantile agent in the trade would not ordinarily transact business. The view I take of the law is really that which was taken in two of the cases cited to us. In *Lamb* v. *Attenborough* (1) a clerk who was authorized by his employer to sign delivery orders per procuration, and who by so doing obtained possession of dock warrants, was held not to be an agent entrusted with the possession of documents of title to goods within the meaning of 5 & 6 Vict. c. 39. Blackburn J. in that case said: "The agent contemplated by the statute is an agent having mercantile possession, so as to be within the mercantile usage of getting advances made. In this case Bryant's possession was that of servant, not of agent; and when the documents were created by the dock company, they belonged to the plaintiff, and he had a right to demand them back from the defendant." In the case of *Hastings* v. *Pearson* (2) a man employed at a salary of 30*s.* per week and a commission to take small articles of jewellery to private houses to sell, instead of selling them for his employers, pawned them for his own benefit. Mathew J. said: "There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. The Factors Act therefore does not apply." Mathew J. therefore dealt with the case on the basis that it could not fairly be said that the agent, who was employed only to sell small articles of jewellery, was a person who, in carrying out the transaction of pledge, was acting in the ordinary course of business of a mercantile agent. It may be possible to take another view of the facts, but that is the way in which the case was decided by Mathew J., and it does not seem to me to go far enough for Mr. Rawlinson's argument. In my opinion the words "acting in the ordinary course of business of a mercantile agent" mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out. Then Mr. Rawlinson took the point that where a pledgee is told by the pledgor

(1) 31 L. J. (Q.B.) 41. (2) [1893] 1 Q. B. 62.

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that the goods are his own—that is to say, where the pledgor does not purport to be agent for any one—the pledgee gets no protection under the Act. I cannot think that it was intended to exclude from the protection given by the Act a case where a mercantile agent has possession of goods with the consent of the owner, and tells a lie to the pledgee in order to obtain an advance upon them. And this view is supported by implication. The preamble of the Factors Act, 1842, recites that it is expedient and necessary that owners entrusting agents with the possession of goods should be bound by any contract of pledge in like manner as they would be bound by a contract of sale, that is, notwithstanding the pledgee has notice that the pledgor is an agent. It seems to me that it would be very strange that the Legislature should intend to protect a transaction of pledge made by a person whom the pledgee knew to be an agent, but not one where the pledgor does not communicate his real position to the pledgee. I am therefore of opinion that Schwabacher was acting in the ordinary course of business of a mercantile agent—or at least there is no evidence that he was not—and that Channell J. was right in ruling that the words of the Act of 1889 have not cut down the protection given to the pledgee by former legislation.

One other point was raised. It was argued that the evidence shewed that Schwabacher, who had a fraudulent mind when he received the diamonds from the plaintiff, obtained the diamonds by larceny by a trick, and therefore was not in possession of them "with the consent of the owner." My brother Channell said that upon the facts he did not think that larceny by a trick had been made out. I agree with Channell J. that the evidence here fell far short of establishing larceny by a trick. The point therefore still remains open whether, assuming the goods to have been obtained by larceny by a trick, the agent can be said to be in possession of them with the consent of the owner. I think that the judgment of Channell J. was right, and that the appeal must be dismissed.

BUCKLEY L.J. Mr. Rawlinson has argued that because the defendants did not deal with Schwabacher upon the footing of his being a mercantile agent the Factors Act does not apply. I

do not think that argument is sound. The question whether the person with whom the pledgor was dealing believed him to be an agent, or believed him to be the owner of the goods, is a question that is not material for the purposes of the Factors Act. The object of the Act, as regards sale, and as regards pledges, was that a person who, with the consent of the owner, is in possession of goods as a mercantile agent shall have the same rights of dealing with them as if he were himself the owner. That was the purpose of the Act; the question whether or not the pledgee believed that the person dealing with him had the character of a mercantile agent is not relevant. He deals with the pledgor because the pledgor has possession of the goods.

Sect. 4 of the Act of 1889 seems to me to give some indication upon the question whether the mercantile agent spoken of in the Act must be a person whom the pledgee believes to be an agent and who purports to deal with the pledgee as an agent. Sect. 4 says that "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge." That section therefore contemplates the case of the agent going to pledge his principal's goods for his own debt. Under those circumstances the pledgee is to get a title to the goods, but only a title limited in the way mentioned in the section. That is to say, the section contemplates that if the pledgor has, as between himself and the owner of the goods, some qualified right, the pledgee is to get that right, but no more than that right. Of course, that must include the case where the agent pretends to be the real owner of the goods when he is not, and shews that the Factors Act applies when the pledgee believes himself to be dealing with the real owner. How does that affect the present question? It is admitted that if the plaintiff had expressly forbidden Schwabacher to pledge the diamonds the pledgees would be protected, because one of the very purposes of the Factors Act is to enable a mercantile agent to effect a valid pledge of goods entrusted to him with an innocent pledgee. But it is argued that a custom in any particular trade that goods cannot be pledged by an agent has

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some higher authority than an express veto by the principal against pledging. For the present purpose I assume that the defendants did not know of this alleged custom in the diamond trade, and that in the matter of this pledge they acted in perfect good faith. Supposing a custom so notorious that everybody must be taken to know it—a pledge by the agent in such a case would not give a good title, because the pledgee would not be a person who, within s. 2, sub-s. 1, "has not at the time of the disposition notice that the person making the disposition has not authority to make the same." That may or may not cover the case of an auctioneer; I do not say whether it does or not. It would, however, be an extraordinary thing if a custom not generally known should have a higher effect than an express veto given by the principal to his agent.

There is a difference of expression between s. 1, sub-s. 1, and s. 2, sub-s. 1. In the one case the expression used is "customary course of his business," while in the other it is "the ordinary course of business of a mercantile agent." I think I see the reason. Sect. 1, sub-s. 1, is speaking of the arrangement made between the owner of the goods and his agent. It contemplates that the principal has given possession of the goods to the agent in the customary course of the business which the principal knows, or believes, the agent carries on as a mercantile agent. It deals with the circumstances under which the agent gets his authority; to satisfy the definition he must get it in the customary course of his business as a mercantile agent. Sect. 2, sub-s. 1, deals with another matter. It has to do with the stage at which the agent is going to deal with the goods in his possession with reference to some other person, and the form of the expression is here altered to "when acting in the ordinary course of business of a mercantile agent." The plaintiff's argument involves our reading there "of such mercantile agent," or "of a mercantile agent in such a trade as that in which he carries on business." I do not think that is the meaning of the expression. I think it means, "acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act"; that is to say, within business hours, at a proper place of business, and in

other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make. Dealing with it in that way, it seems to me that there is no great difficulty in the Act of Parliament. That being so, it seems to me that the judgment in the Court below was right, and that the appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. Upon the question of the exact effect of the words in s. 2, sub-s. 1, "when acting in the ordinary course of business of a mercantile agent," I do not feel quite sure, and I reserve to myself the right of considering on some future occasion what they mean. But I feel sure of this, that Channell J. was right in saying that these words ought not to be taken to exclude from the operation of the Act the case in which an agent would not, according to the custom of a particular trade, have authority, as agent, to pledge goods which are the subject of that trade, because, according to that custom, the pledging of such goods is a business which the merchants in that trade are accustomed to do for themselves. That which has already been said by my Lord and by Buckley L.J. affords admirable reasons in support of that view, and Channell J. himself has pointed out that it would be a very strange thing if the members of any particular trade could take themselves out of the operation of the Factors Act by saying that they only authorized their agents to sell, and never gave them authority to pledge. If, as it has been said, it is notorious in any particular business that a person who is in the position of agent has no authority in the ordinary course of business to pledge goods, then the proviso at the end of the sub-section will, I should think, usually be sufficient to protect the real owner of the goods whose property has been improperly dealt with by the agent, who is known to the pledgee to be an agent only. I am not quite sure, as I have said, what is exactly meant by the expression "when acting in the ordinary course of business of a mercantile agent," but I am inclined to think that it is meant to apply to a person who, being a

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mercantile agent, is acting at the time, and in the manner, and possibly in other respects, as though he had authority and occasion as a mercantile agent to make the pledge. It was contended that the expression implies that the pledgee must know that the pledgor was an agent. I do not think that contention well founded. It seems on the face of it to be a strange contention, because a pledgee ought rather to be more protected if he does not know that the pledgor is an agent than if he knows the pledgor's business to be that of an agent. In the absence of any such words in the sub-section as "when professing to act," I cannot accept the suggestion made by Mr. Rawlinson.

It seems to me, therefore, that, whatever limits may be put on the meaning of this expression in other cases, this appeal cannot succeed, because on the main point, which Channell J. described as the difficult question in the present case, he has decided quite rightly.

With regard to the question of larceny by a trick, we have had to consider it in a similar case in the Court of Appeal (1), where I have already expressed my view. It is unnecessary to decide whether there could be a "consent of the owner" within the meaning of this sub-section in a case where the agent has been properly and legitimately found by a jury to have got possession of the goods by what is termed larceny by a trick. It would be, in my view, difficult to hold that the Legislature intended that a man who has been found guilty of stealing goods can be considered to be in possession of them with the consent of the owner. But in the present case I think Channell J. was right in thinking on the facts that larceny by a trick had not been made out. In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Julius A. White.*
Solicitor for defendants: *Stanley J. Attenborough.*

(1) *Oppenheimer* v. *Frazer & Wyatt*, [1907] 2 K. B. 50.

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Nov. 29.

CHAPLIN & CO., LIMITED *v.* BRAMMALL.

Husband and Wife—Guarantee signed by Wife for Debt of Husband—Influence of Husband—Sufficient Explanation of Document not given to Wife—Notice to Creditor of Relationship—Creditor procuring Guarantee through Husband.

The plaintiffs, having agreed to supply goods to the defendant's husband on credit if his wife would guarantee payment by him of their price, sent to the husband a form of guarantee, in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guarantee, without sufficiently explaining to her the nature of the document, which she did not understand when she signed it. Goods having been supplied by the plaintiffs to the defendant's husband, the price of which was not paid, the plaintiffs sued the defendant on the guarantee:—

Held, that the action was not maintainable.

Bischoff's Trustee v. *Frank*, (1903) 89 L. T. 188, and *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, followed.

Appeal by the plaintiffs from the judgment of Ridley J. in an action tried by him without a jury.

The action was to recover the sum of 300*l.* upon a guarantee signed by the defendant, a married woman, which was in the following terms: "Gentlemen,—In consideration of your having supplied and continuing to supply my husband Mr. R. J. Brammall with wines and spirits on terms set out in your letter to him of August 24, 1904, or any other terms to be agreed upon between you from time to time, I hereby give you a continuing guarantee to the extent of 300*l.* (three hundred pounds), and undertake to pay any debt owing and due to you by my husband which he has failed to discharge within a month after your having given him written notice that you require payment, not exceeding in the aggregate the above-mentioned sum."

It appeared that in 1904 the defendant's husband, who was then starting in business as a wine and spirit merchant, applied to the plaintiffs, who were dealers in wines and spirits, to supply him from time to time with stock on credit. Negotiations ensued with regard to the terms of the proposed credit, and the security to be given by the defendant's husband. In the course of an

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interview which took place between a director of the plaintiff company and the defendant's husband, the latter having stated that his wife had property of her own, a proposal was discussed that she should give a guarantee in respect of the credit to be given to her husband. On August 24, 1904, the plaintiffs wrote to the defendant's husband as follows: "With reference to Mr. Hawkins' conversation with you to-day, we beg to say that, if your wife becomes your surety to the aggregate amount of 300*l.*, we agree to give you, as we wrote on July 25, full cash discount on your orders amounting in the aggregate to this sum, and then to consider it as a deferred debt, subject to 5 per cent. per annum interest, which we are willing to leave as a debt for any time we may arrange with you, and which we may think reasonable." With this letter the plaintiffs sent to the defendant's husband a letter of guarantee, in order that he might obtain his wife's signature to it. The defendant signed the letter of guarantee so sent, which was the instrument upon which the action was brought. With regard to the circumstances under which the instrument was signed by her, the defendant gave evidence at the trial to the effect that she signed a paper at home one day; that she was just going out at the time, and her husband called her back and said that he wanted her to sign something; and that she did not read it, nor was it read over to her, before she signed it. She further stated that she did not know that what she signed was anything important, or that it was a guarantee. The husband, after the wife's signature had been obtained to the guarantee, sent it to the plaintiffs. Goods had been supplied by the plaintiffs to the defendant's husband to the extent of the guarantee, the price of which remained unpaid. There was some conflict at the trial between the evidence of the defendant as above-mentioned and that of her husband as to what had taken place when the guarantee was signed; but the learned judge, in giving judgment, said in effect that, on the evidence, he ought to, and did, come to the conclusion that the defendant was not sufficiently informed of the contents of the document which she signed, and did not understand it when it was signed by her. He said that the plaintiffs would have been entitled to succeed had there not been

the relationship of husband and wife between the guarantor and her husband; but, there being that relationship, the principles laid down in *Bischoff's Trustee* v. *Frank* (1) and *Turnbull & Co.* v. *Duval* (2) applied, and therefore his judgment must be for the defendant.

C. C. Scott, for the plaintiffs. A person who negligently and without due care signs an instrument, without informing himself of its contents and nature, is bound by it as regards a person who has given value in good faith on the strength of it: *Foster* v. *Mackinnon* (3); *Lewis* v. *Clay*. (4) The learned judge in this case did not hold that the facts were such as to substantiate a plea of non est factum, and clearly treated the guarantee as duly executed by the defendant, subject to the question whether in equity it was binding upon her; for he said that the plaintiffs would have been entitled to succeed but for the existence of the relationship of husband and wife between the person guaranteed and the guarantor. He based his judgment on the ground of that relationship and the fact that the instrument had not been properly explained to the defendant at the time when she signed it.

[VAUGHAN WILLIAMS L.J. In cases of the class to which the doctrine as to the effect of negligence mentioned in *Foster* v. *Mackinnon* (3) and *Lewis* v. *Clay* (4) applies there is no question of the signature of the instrument having been obtained by a person between whom and the person signing there is a relation which involves the existence of a special influence.]

The cases in which the existence of such an influence has been held to invalidate the instrument are cases in which the question of its validity has arisen between the person who executed the instrument and the person who has taken advantage of the special influence, or a volunteer claiming under him, or some one with notice of the circumstances out of which the equity arose. The cases shew that the instrument will not be invalidated as against a person taking for value under it, unless the circumstances were such as to give him notice, or reason to suspect

(1) 89 L. T. 188.
(2) [1902] A. C. 429.
(3) (1869) L. R. 4 C. P. 704.
(4) (1897) 67 L. J. (Q.B.) 224.

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that something was wrong or that undue influence might be used. In *Bainbrigge* v. *Browne* (1) it was held by Fry J., where a deed conferring a benefit on a father had been executed by a child who was not emancipated from the father's control, that, so far as the father or any volunteer claiming under him was concerned, the onus lay on him of shewing that the child had independent advice, and that he executed the deed with full knowledge of its contents and with the free intention of giving the father the benefit conferred by it, and that this onus extended to any person taking with notice of the circumstances which raised the equity, but did not extend any further, and therefore the mortgagees, who had given value without notice of the circumstances, were not subject to it. In *Bischoff's Trustee* v. *Frank* (2) and *Turnbull & Co.* v. *Duval* (3) it was abundantly clear that the parties seeking to enforce the instrument were affected with notice of the circumstances from which the equity arose. In the former case the creditor was himself present when the guarantee was signed, and was therefore aware of all the circumstances under which its signature was procured. In *Turnbull & Co.* v. *Duval* (3) the appellants' agent Campbell procured the making of the charge with full knowledge of all the circumstances under which it was obtained, and the appellants could not stand in a better position than he would have done. The defendant's husband in this case cannot be considered as having been the agent of the plaintiffs to procure the guarantee, and the plaintiffs had no knowledge of anything wrong in the matter.

[VAUGHAN WILLIAMS L.J. In *Turnbull & Co.* v. *Duval* (3) Lord Lindley said in giving judgment: "It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval"—the husband—"and must abide the consequences." So here the plaintiffs left everything to the defendant's husband.]

This case is not analogous. In that case Campbell was the appellants' agent, and he stood also in a fiduciary position to Mrs. Duval, and knew all the circumstances. [He also cited

(1) (1881) 18 Ch. D. 188.
(2) 89 L. T. 188.
(3) [1902] A. C. 429.

Parfitt v. *Lawless* (1); *Bridgman* v. *Green* (2); *De Witte* v. *Addison* (3); *Rhodes* v. *Bate.* (4)]

No one appeared in support of the judgment.

VAUGHAN WILLIAMS L.J. In my judgment this appeal should be dismissed. Those who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document. That being so, I am sorry for the plaintiffs that they turn out not to be in a position to prove that any proper explanation of the instrument which she was about to sign was given to the defendant before she signed it. On the contrary, Ridley J. has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it. It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter. But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guarantee was to be procured through the guarantor's husband, who was living with his wife at the time, and would presumably have the influence of a husband over her, fail to shew that the document was properly explained to her. Under those circumstances the case appears to me to fall within the decision in *Bischoff's Trustee* v. *Frank* (5), cited by Ridley J. in his judgment. But, apart from that decision, I think it falls exactly within the words of Lord Lindley in the case of *Turnbull & Co.* v. *Duval.* (6) He there said: "Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their

(1) (1872) L. R. 2 P. & M. 462.
(2) (1755) 2 Ves. Sen. 627.
(3) (1899) 80 L. T. 207.
(4) (1866) L. R. 1 Ch. 252.
(5) 89 L. T. 188.
(6) [1902] A. C. 429, at p. 434.

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Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences." So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing. Under the circumstances I do not think that I need go through the other authorities which were cited. I should wish, however, to say that, in my opinion, the decision in *Bainbrigge* v. *Browne* (1) has no application to the present case. There the persons who had given valuable consideration had not sent or requested the person who obtained the execution of the instrument in question to procure its execution, and were not aware of the influence which that person had over those who executed it, the case not being one where there was a necessary presumption that such influence existed.

SIR GORELL BARNES, PRESIDENT, and BIGHAM J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Geo. Brown, Son & Vardy.*

(1) 18 Ch. D. 188.

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 3.

RHONDDA URBAN DISTRICT COUNCIL *v.* TAFF VALE RAILWAY COMPANY.

Railway Company—Bridge—Approaches—Public Carriage Road carried over Railway—Width of Bridge—Liability of Railway Company—Special Act—Construction—Railways Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 20), *ss.* 50, 51.

By the Taff Vale Railway Act, 1836, s. 69, it was in substance provided that, where a bridge should be erected by the railway company for carrying a public highway over the railway, it should be formed and continued of a width of not less than fifteen feet.

By the Railways Clauses Consolidation Act, 1845, s. 50, so far as material, "every bridge erected for carrying" a public carriage road "over the railway shall, except as otherwise provided by the special Act," be of the width of twenty-five feet; but by s. 51 it is provided that, "where the average available width for the passage of carriages of any existing roads within fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet; provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway."

By the Taff Vale Railway Act, 1846, the provisions of the Taff Vale Railway Act, 1836, were incorporated, except such of them as were inconsistent with those of (among other Acts) the Railways Clauses Consolidation Act, 1845:—

Held, that the provisions of the Taff Vale Railway Act, 1836, s. 69, were not inconsistent with those of the Railways Clauses Consolidation Act, 1845, and therefore the obligations of the railway company as regards a bridge coming within the terms of that section, which was erected under the powers given by the Taff Vale Railway Act, 1846, were governed, not by the Railways Clauses Consolidation Act, 1845, s. 50, but by their special Act.

Semble that the liability imposed on railway companies by s. 51 of the Railways Clauses Consolidation Act, 1845, to widen "bridges"

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carrying roads over railways where the width of the road has been increased "beyond the width of such bridge on either side thereof" does not extend to the approaches to the bridge.

APPEAL from the judgment of Phillimore J. in an action tried by him without a jury. (1)

The plaintiffs claimed: "(1.) A declaration that the defendants were bound forthwith at their own expense to widen to the width of twenty-five feet between the fences thereof the bridge erected by them for carrying the public carriage way over their Rhondda branch railway at a point immediately north of the defendants' Ystrad Station, together with the approaches to the said bridge, and to do all necessary acts and construct all necessary works to effect the widening of the said bridge and the approaches thereto as aforesaid. (2.) A mandamus commanding the defendants forthwith at their own expense to widen the said bridge and the approaches thereto to a width of twenty-five feet."

The facts are more fully stated in the report of the case in the Court below, but for the purposes of this report they may be briefly stated as follows. The bridge in question was erected by the defendants under the powers given to them by the Taff Vale Railway Act, 1846. The road which by means of it was carried over the railway was a public carriage road within the meaning of the Railways Clauses Consolidation Act, 1845. It was, at the time when the bridge was made, of a circuitous and narrow character, probably not more than twelve feet wide in places. The roadway over the bridge was of a width of about eighteen feet. The plaintiffs alleged, and the learned judge was of opinion, that the average available width of the road had, since the construction of the railway, been increased beyond the width of the bridge, and to a width exceeding twenty-five feet, within the meaning of the latter part of s. 51 of the Railways Clauses Consolidation Act, 1845. (2)

(1) See [1907] 1 K. B. 739.

(2) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 50: "Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations; . . . .

"The road over the bridge shall

It was contended for the defendants that s. 69 of the Taff Vale Railway Act, 1836, applied, and that the provisions of ss. 50 and 51 of the Railways Clauses Consolidation Act, 1845, had no application to the case; and furthermore that, assuming the provisions of the last-mentioned Act to apply, the word "bridge" have a clear space between the fences thereof of thirty-five feet if the road be a turnpike road, and twenty-five feet if a public carriage road, ..."

By s. 51: "Provided always, that in all cases where the average available width for the passage of carriages of any existing roads within fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet; provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway."

By the Taff Vale Railway Act, 1836 (6 & 7 Will. 4, c. lxxxii.), s. 69: "Where any bridge shall be erected for carrying any turnpike road, public highway or occupation road over the said railway, the road over such bridge shall be formed and shall at all times be continued of such width as to leave a clear and open space between the fences of such road of not less than twenty-five feet for the purpose of a turnpike road and for the purposes of any public highway or occupation road of not less than fifteen feet."

By the Taff Vale Railway Act, 1846 (9 & 10 Vict. c. cccxciii.), s. 1 (after reciting, inter alia, the Taff Vale Railway Act, 1836), "all the provisions contained in the said recited Acts relating to the Taff Vale Railway so far as the same are now in force and except such of them as are inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, and except also such as by this Act are altered or otherwise provided for shall extend to this Act and to the several purposes thereof as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes."

By s. 3 "all the provisions of the said Lands Clauses Consolidation Act, 1845, and of the said Railways Clauses Consolidation Act, 1845, so far as the same are applicable, and save in so far as the same may be inconsistent with the provisions hereinafter mentioned, shall extend to this Act and to the several purposes thereof, and the same, together with this Act, shall be read as one Act."

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in s. 51 of that Act did not include the approaches to the bridge.

Phillimore J. held that the provisions of s. 51 of the Railways Clauses Consolidation Act, 1845, applied, and therefore the defendants were liable to widen the bridge to the width of twenty-five feet, but that the word "bridge" in that section only applied to the bridge proper, and not to the approaches; and he therefore made a declaration accordingly. (1)

The plaintiffs appealed against the judgment of Phillimore J. as regards the approaches to the bridge, and a cross-notice of appeal was given by the defendants as regards the declaration that they were bound to widen the bridge.

Montague Lush, K.C., and *Bailhache*, for the plaintiffs, in support of their appeal. The term "bridge" in s. 51 of the Railways Clauses Consolidation Act, 1845, includes the approaches to the bridge as well as the bridge proper. At common law the obligation of the inhabitants of a county to repair a bridge always included the repair of the approaches to the bridge, which are to be looked upon as part of the bridge. Inasmuch as it was often difficult to say where the approaches to the bridge began, they were defined by the Statute of Bridges (22 Hen. 8, c. 5), s. 7, as extending to 300 feet from the ends of the bridge. The bridge would be useless as a bridge unless the ascents on either side of it, where necessary, were made and maintained. The construction of the word "bridge" contended for by the defendants involves the absurd consequence that, though the railway company must make the bridge of a certain width under the provisions of s. 50 of the Railways Clauses Consolidation Act, 1845, they need not make the approaches of any particular width, and, though under s. 51 they must widen the bridge when required to do so by that section, the approaches will be left of their original width, for the highway authority have no power to widen them. It will be found, on examination of the sections of the Railways Clauses Consolidation Act, 1845, which refer to bridges, that the approaches are only mentioned where it is necessary for the purposes of the section to discriminate between the bridge and its approaches,

(1) See [1907] 1 K. B. 742-6.

but that in other cases the word "bridge" must by necessary implication be construed as including the approaches to the bridge. The approaches are treated as part of the bridge in s. 46 of the Railways Clauses Act, 1845.

Levett, K.C., and *J. G. Wood*, for the defendants. If the defendants' cross-appeal is well founded, and s. 69 of the Taff Vale Railway Act, 1836, applies, the question raised by the appeal as to the meaning of the word "bridge" in s. 51 of the Railways Clauses Act, 1845, is immaterial. Under s. 69 of the special Act of 1836 the obligation of the defendants is to make and maintain a bridge fifteen feet wide, that being the width specified in the section, and that obligation they have satisfied. Sect. 1 of the Taff Vale Railway Act, 1846, incorporates the provisions of the Taff Vale Railway Act, 1836, except such of them as are inconsistent with the Lands Clauses Act or the Railways Clauses Act or the Act of 1846 itself. The effect is to re-enact as of the date of the Act of 1846 the provisions so incorporated. So much of the Act of 1836 as is incorporated by the Act of 1846 became a new enactment by incorporation, and cannot be regarded as a past Act, as Phillimore J. regarded it, for the purpose of applying s. 1 of the Railways Clauses Consolidation Act, 1845. There is no inconsistency between the provisions of s. 69 of the Act of 1836 and the provisions of the Railways Clauses Consolidation Act, 1845. The Act of 1846, including the provisions of the other Acts incorporated therewith, must be looked at as one Act, all coming into effect at the date of the passing of the Act, and all the provisions of the Acts in question must be read side by side as of that date in order to see whether there is any such inconsistency as the plaintiffs allege to exist between the provisions of s. 69 of the Act of 1836 and the provisions of the Railways Clauses Act, 1845, with regard to bridges. The Railways Clauses Consolidation Act, 1845, is not to be regarded as a substantive enactment, having an independent existence of its own prior to the passing of the special Act. It can only have effect as incorporated with a special Act, and it is fallacious to construe it as an independent Act apart from any special Act. By s. 1 its clauses and provisions only apply, "save so far as they shall be expressly varied or excepted by any such

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Act." Therefore the provisions of s. 50 of the Railways Clauses Act, 1845, will not apply if and so far as they are expressly varied by the special Act of 1846, including therein the incorporated portion of the special Act of 1836. It is argued for the plaintiffs that s. 69 is inconsistent with s. 50 of the Railways Clauses Act, and therefore is not incorporated with the special Act of 1846; but that is not so, because s. 50 of the Railways Clauses Act is only applicable "except as otherwise provided by the special Act," and in this case the special Act of 1846, which incorporates the provisions of the Act of 1836, except so far as inconsistent with the provisions of the Railways Clauses Act, must be regarded as having "otherwise provided."

Montague Lush, K.C., and *Bailhache*, for the plaintiffs, were called upon to argue the point raised by the cross-appeal. The recitals of s. 1 of the Railways Clauses Act, 1845, are important as shewing that the provisions of that Act were intended to apply to all railways the construction of which should be authorized by any future special Act, except so far as the Legislature might in such future Act expressly authorize a deviation from those provisions; and it is submitted that a special Act ought not to be construed as authorizing such a deviation, unless it does so in very clear language, which the Act of 1846 certainly cannot be said to do. Sect. 3 of the Act of 1846 only excludes from the incorporation with that Act of the Railways Clauses Act so much of the latter Act as is "inconsistent with the provisions *hereinafter* mentioned." It follows that all the rest of the Act is incorporated, and by implication that the Act does not contemplate that there is anything inconsistent with the Railways Clauses Act, 1845, in what has been "before mentioned," which would certainly be the case if s. 69 of the Act of 1836 were to be read as incorporated with the Act of 1846, to the exclusion of ss. 50 and 51 of the Railways Clauses Act, 1845. None of the provisions which come after s. 3 are inconsistent with the provisions of those sections. The whole of the Act of 1836 is not incorporated by the Act of 1846, but only so much as is not inconsistent with the Railways Clauses Act. Therefore, before it can be ascertained how much of the Act of 1836 is incorporated, it is necessary to see what provisions

of that Act are consistent and what are inconsistent with the Railways Clauses Act. Sect. 69 of the special Act of 1836 is clearly inconsistent with s. 50 of the Railways Clauses Act, 1845. The words "except as otherwise provided by the special Act" in that section contemplate a provision to be made by an Act passed subsequently to 1845, as is shewn by s. 1 of the Railways Clauses Act, 1845, which provides that the provisions of that Act shall apply "except so far as they shall be expressly varied or excepted by any such Act," i.e., "an Act which shall hereafter be passed." Sect. 2 of the Railways Clauses Act, 1845, defines the expression "the special Act," as used in the Act, as meaning "any Act which shall be hereafter passed authorizing the construction of a railway and with which this Act shall be so incorporated as aforesaid."

Levett, K.C., for the defendants, in reply. The contention for the plaintiffs involves for the present purpose the notion of an interval of time between the enactment of the provisions of the Act of 1846 and that of the incorporated provisions. That is to construe the Act on a false basis. The incorporated provisions are to be regarded as enacted de novo at the same time as the rest of the Act. Therefore the portion of the Act of 1836 which is incorporated must be regarded as part of a special Act passed subsequently to 1845. Treating the Act on that basis, the provisions of the Act of 1836 and the provisions of the Railways Clauses Act must be placed side by side in order to see what inconsistencies there may be. On that footing there is no inconsistency between s. 69 of the Act of 1836 and the Railways Clauses Consolidation Act, 1845.

VAUGHAN WILLIAMS L.J. There are two appeals in this case; and it appears to me that, strictly speaking, if we decide in favour of the defendants on the cross-appeal, it will not be necessary to discuss the question whether Phillimore J. was right in holding that the liability of a railway company under s. 51 of the Railways Clauses Act is limited to the widening of the bridge proper. I think, however, that, if it had been necessary to decide the appeal on that point, we ought to have affirmed the learned judge's decision. I agree with him in thinking that the word

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"bridge," as used in s. 51 of the Railways Clauses Consolidation Act, 1845, is used in reference to the bridge proper in contradistinction to the pieces of road which form the approaches to the bridge. I do not think it is necessary for me to go through the arguments which have led me to that conclusion; I will only say that they have convinced me that the view taken by Phillimore J. was clearly right.

I now propose to deal with the question raised by the cross-appeal, with regard to which I am of opinion that the argument of the defendants' counsel was sound. It will be better for me to begin by reading the sections on which, in my judgment, the question depends. The first of those sections is s. 1 of the Railways Clauses Consolidation Act, 1845, which provides that, "this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act." Having read that section, I will next read s. 1 of the defendants' special Act of 1846, which, after reciting, among other Acts, the defendants' special Act of 1836, provides that "all the provisions contained in the said recited Acts relating to the Taff Vale Railway, so far as the same are now in force, and except such of them as are inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, and except also such as by this Act are altered or otherwise provided for, shall extend to this Act, and to the several purposes thereof, as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes." When one is considering the effect of these words, one must, I think, read the special Act of 1836 as it is to be read by the light of the provisions of the Railways Clauses Consolidation Act, 1845, that is to say, subject to the qualification imported by the words "save so far as they

shall be expressly varied or excepted by any such Act" in the latter part of s. 1 of that Act. That being so, it appears to me that, even if there had been in the defendants' special Act of 1846 no such section as s. 3, which I shall presently read, without that section the Railways Clauses Consolidation Act, 1845, would not in its entirety have controlled the Act of 1836, but would only have controlled that Act subject to the qualification to which I have referred in s. 1 of the Railways Clauses Consolidation Act, 1845. Sect. 3 of the defendants' special Act of 1846 runs thus: "All the provisions of the said Lands Clauses Consolidation Act, 1845, and of the said Railways Clauses Consolidation Act, 1845, so far as the same are applicable"—I pause there to say that so far the section seems to be really only giving effect to the words in s. 1 of the Railways Clauses Act; then it proceeds—"and save in so far as the same may be inconsistent with the provisions hereinafter mentioned, shall extend to this Act, and to the several purposes thereof, and the same, together with this Act, shall be read as one Act." A great part of the argument of the counsel for the plaintiffs was really based on these words of s. 3; and, though he deprecated somewhat having to make the point, and repudiated any desire to be over-technical in construing the words of the Act, he did in fact make a strong point upon the words "save in so far as the same may be inconsistent with the provisions *hereinafter* mentioned." He pointed to the words "hereinafter mentioned" as excluding from the saving clause of s. 3 the provisions of the Act of 1836, upon which the defendants rely as justifying the original construction of the bridge in question by them of its present width and their maintenance of it at that width. But, in my opinion, one must bear in mind that, as I have already pointed out, the Railways Clauses Act, 1845, does not in its entirety control the special Act of 1836, not by reason of the provisions of s. 3 of the special Act of 1846, but, independently of that section, by reason of the restriction of its application by the words to which I have alluded in the latter part of s. 1 of the Railways Clauses Act, 1845, and which in my opinion are referred to by the words "so far as the same are applicable" in s. 3 itself. The words "save in so far as the same may be inconsistent with the provisions hereinafter mentioned"

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in that section are not, in my judgment, a slip or mistake, or words without effect, but were, I think, inserted for the purpose of expressly including in the saving clause the matters which are subsequently dealt with in the Act. The plaintiffs' counsel does not deny that in the subsequent sections of the Act there is ample subject-matter to which these words can be applied. Really his argument involved, as it seemed to me, the assertion that, except in so far as these words "save in so far," &c., in s. 3 operated in the defendants' favour, there was nothing upon which the defendants could rely; but this argument seems to me to ignore the limited applicability of the Railways Clauses Act, 1845, which is in my opinion imported by the latter words of s. 1 of that Act.

Having said this much as to the argument based upon s. 3 of the special Act of 1846, I will proceed to deal with the other point made by the plaintiffs' counsel. It seems to me that his whole argument was based on the existence of an interval of time between the provisions of the special Act of 1836, when regarded as incorporated by the special Act of 1846, and the latter Act, and I cannot recognize any such interval. We have really here ultimately one Act, and one only, to deal with, that being an Act which incorporates to a certain extent the various Acts referred to by the recitals in s. 1. That being so, we have to ask ourselves first the question how far the various provisions of the recited Acts are to be treated as respectively incorporated with the Act of 1846, and then the question based on the words "save in so far," &c., in s. 3 of the Act, namely, how far the provisions of the Acts referred to in that section are inconsistent with the provisions thereinafter mentioned. In my judgment the point of time with reference to which we must consider these questions, and must for that purpose examine the sections and determine what inconsistencies may exist between them, is the point of time when the Act of 1846 became law. One must take the Act of 1846, which incorporates parts of other Acts, including the special Act of 1836 and the Railways Clauses Act, 1845, and, reading the clauses of the incorporated Act of 1836 and the clauses of the Railways Clauses Act with reference to the date of the passing of the special Act of 1846, place them side by

side, and, having done so, ask oneself what inconsistencies exist between them from that standpoint. If one does that, no doubt there will be apparent inconsistencies, but that will not defeat the defendants' contention; because, though such inconsistencies may exist, one must bear in mind the limitation of the application of the Railways Clauses Consolidation Act, 1845, which is imported by the words of s. 1 of that Act; and, bearing that in mind, it will be seen that what appeared to be an inconsistency is no inconsistency at all, because those portions of the Railways Clauses Act which at first sight seemed to be inconsistent with the special Act are qualified by the words "save so far as they shall be expressly varied or excepted by any such Act" in s. 1. For these reasons I think the defendants ought to succeed, and their appeal must be allowed.

SIR GORELL BARNES, PRESIDENT. I agree, and have not very much to add, the ground having been so thoroughly covered by the judgment of the Lord Justice.

So far as the appeal of the plaintiffs is concerned I should take the same view as Phillimore J. did, and should say that the words of s. 51 of the Railways Clauses Act, 1845, must be construed in the way in which he construed them, if it were necessary to give a decision on that point.

The point raised by the cross-appeal of the defendants is no doubt a difficult one, because the enactments relating to this matter are drawn as if with the object of creating a sort of Chinese puzzle; and therefore it is not to be wondered at that during the argument one did not find it easy to decide between the contentions alternately put forward by the counsel on either side respectively. But, looking at the effect of the sections as a whole, my view is in accordance with that taken by Vaughan Williams L.J.

The matter may be put shortly thus. Phillimore J. in substance held that the provisions of s. 69 of the Taff Vale Railway Act, 1836, were not operative as regards the matter in question, because the provisions of that Act were controlled by those of the Railways Clauses Act, 1845, with which they were inconsistent. In substance he treated the provisions of the special

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Act of 1836 as those of a past Act, which, having been passed before the Railways Clauses Act, 1845, could not be considered as intended to be referred to by the words of that Act referring to a special Act. The matter turns on the effect of the incorporating sections of the defendants' special Act of 1846. Sect. 1 of that Act incorporates the provisions of the recited Acts, one of which is the special Act of 1836, except such of them as are inconsistent with the provisions of the Lands Clauses Act and the Railways Clauses Act, and provides that the provisions so incorporated shall extend to the Act of 1846, and to the several purposes thereof, as fully and effectually as though such provisions were re-enacted in that Act as applicable to such purposes; and s. 3 of the Act of 1846, which has been already read by the Lord Justice, and which I will therefore not read again, effects the incorporation of the Railways Clauses Act so far as applicable, and save in so far as the same may be inconsistent with the provisions thereinafter mentioned. Now, such being the provisions of the Act of 1846 with regard to the incorporation of previous Acts, the point is made for the plaintiffs that the defendants are attempting to bring in a section of the Act of 1836 that is inconsistent with the sections of the Railways Clauses Act, 1845, by which the matter in question must be governed. The argument for the defendants, on the other hand, is that this is not so, and that the incorporating section of the Act of 1846 is effective to bring in such provisions of the special Act of 1836 as enable them to maintain the position that the bridge, as it exists at present, is as wide as they are bound to make it. In my opinion the argument of the defendants' counsel is sound. It is not easy to arrive at the meaning of these incorporating sections. In substance, however, the argument for the defendants was as follows. Where you find sections in the recited Acts which are inconsistent with the provisions of the Railways Clauses Act, 1845, there is, no doubt, no incorporation of those sections. Of this the defendants' counsel has given several illustrations; but he argued that, as regards s. 69 of the special Act of 1836, which is the section which concerns the present case, there is no inconsistency, because the section which it is sought to incorporate may be regarded as consistent with the section of the Railways Clauses

Act, 1845, dealing with the same subject-matter, inasmuch as that section does not import an absolute provision, but only requires the fulfilment of certain conditions, "except as otherwise provided by the special Act." Sect. 50 of the Railways Clauses Act, 1845, provides that "every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations." The plaintiffs object that there is no special Act which can be referred to by the defendants in substitution for the provisions of the Railways Clauses Act, 1845, in this case, because the Act of 1836 was a past Act, and therefore could not be treated as a future Act relatively to the date 1845, or as being referred to by the words "any Act which shall hereafter be passed" in the Railways Clauses Act, 1845. This contention of the plaintiffs must, I think, involve the notion of an interval of time between the provisions of the Acts incorporated by the Act of 1846 and that Act. But it seems to me that one must view the whole of the incorporated provisions as forming part of the Act of 1846 and coming into operation at the same moment as that Act. I think that the substance of what was intended was that the whole should be regarded as a special Act qualifying the provisions of the Railways Clauses Act where that Act admits of such qualification. That construction seems to me to accord with good sense, and to give a fair and reasonable meaning to the words of the Act. I agree with what Vaughan Williams L.J. has said with regard to the meaning of s. 3 of the special Act of 1846.

BIGHAM J. I agree. With regard to the appeal of the plaintiffs, I think that the word "bridge" in s. 51 of the Railways Clauses Consolidation Act, 1845, must be taken to mean the bridge proper, and not to comprise the pieces of roadway forming the approaches to the bridge.

I can express my view with regard to the point raised by the cross-appeal very shortly. The defendants' special Act of 1846 incorporates the provisions of their special Act of 1836, except such of them as are inconsistent with the provisions of the Railways Clauses Act, 1845. It therefore

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incorporates the provisions of s. 69 of the Act of 1836, which defines the liability of the railway company as regards the width of the bridges erected by them as therein provided, unless they are inconsistent with the Railways Clauses Act, 1845. Then are those provisions inconsistent with the Railways Clauses Act, 1845? I think not, because the effect of s. 50 of that Act, with which they are alleged to be inconsistent, is limited and made consistent with s. 69 of the Act of 1836 by the words "except as otherwise provided by the special Act."

Appeal dismissed, and cross-appeal allowed.

Solicitors for plaintiffs: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

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[IN THE COURT OF APPEAL.]

WILLIAMS *v.* MIDLAND RAILWAY COMPANY.

Railway Company—Carrier—Just and reasonable Condition—Carriage of Dogs—Declaration of Value—Extra Charge in respect of Dogs worth more than 2l.—Percentage on Excess Value—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

A contract signed by a person delivering a dog for carriage to a railway company stated that the company would not be common carriers of dogs, nor would they receive dogs for carriage except on the condition that they should not be responsible beyond the sum of 2*l.*, unless a higher value was declared at the time of delivery to the company and a percentage of $1\frac{1}{4}$ per cent. paid upon the excess of the value so declared:—

Held, that the above-mentioned condition was just and reasonable within the meaning of the Railway and Canal Traffic Act, 1854, s. 7, and, there having been no declaration of value, protected the railway company from liability beyond the amount of 2*l.* in respect of the loss, through the negligence of their servants, of the dog delivered to them for carriage.

APPEAL from the judgment of Walton J. in an action tried by him without a jury.

The action was for damages for the loss of a dog belonging to

the plaintiff, which had been delivered for carriage by the defendants' railway.

The dog, which was worth 30*l*., had been consigned for carriage by railway by passenger train from Neath to Chesterfield packed in a hamper. When the hamper with the dog in it reached Chesterfield, it was placed for a while in the parcels office there awaiting delivery, when, through the negligence of the defendants' servants, the hamper took fire and the dog was burnt. The plaintiff's agent by whom the dog was forwarded had signed a contract note with regard to the carriage of the dog, which, so far as material, was as follows. On one side was printed: "Notice. The railway company are not, and will not be common carriers of horses, cattle, sheep, pigs, asses, mules, dogs, or other quadrupeds . . . . and receive, forward, and deliver the same solely on and subject to the conditions on the other side. I agree to the above notice and to the conditions on the other side." Here followed the signature. On the other side there were conditions of which the material one was as follows: "The company will not in any case be responsible beyond the following sums . . . . dogs, deer, and goats, 2*l*. each . . . . unless a higher value be declared at the time of delivery to the company, and a percentage of $1\frac{1}{4}$ per cent. (minimum 3*d*.) paid upon the excess of the value so declared."

No declaration of value was made at the time when the dog was delivered for carriage. The fare paid for the dog was 4*s*.

The company had paid 2*l*. into Court.

Evidence was given for the defendants to the effect that there was exceptional risk involved in the carriage of dogs by railway owing principally to their always endeavouring to escape; that, in the case of such valuable dogs as that in question, the company, if the value were declared, would send a railway servant with the dog to look after it during the journey; that the special rate of $1\frac{1}{4}$ per cent. was the usual rate which was charged on dogs whose value was declared to be over 2*l*. by all the railway companies in the United Kingdom, that rate having been fixed by arrangement made among the companies subsequently to the decision in *Dickson* v. *Great Northern Ry. Co.* (1), in which case

(1) (1886) 18 Q. B. D. 176.

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it was held that a special rate of 5 per cent. was unreasonable; and that the charge had been frequently paid during the last sixteen or seventeen years, and no objection had been made to it.

It appeared that the ordinary third-class fare for a passenger from Neath to Chesterfield was 15*s.* 6*d.*, and the ordinary first-class fare for the same distance was 1*l.* 8*s.* 5*d.*

The learned judge, in giving judgment, said, in effect, that, on the evidence before him, he could not find as a fact either one way or the other whether the special rate charged for dogs was or was not reasonable, but, the onus being on the defendants to shew that the condition was just and reasonable, in his opinion they had not, in the absence of any evidence of statistics with regard to the carriage of dogs adduced by them to justify the figure at which they had fixed the rate, satisfied that onus, and therefore had failed to prove that the condition was just and reasonable. He therefore gave judgment for the plaintiff for 300*l.* damages.

Sir R. B. Finlay, K.C. (*B. Francis-Williams, K.C., J. D. Crawford,* and *W. O. Hodges* with him), for the defendants. The only question really is whether the special rate for dogs whose value is declared as being over 2*l.* is excessive. The onus is, no doubt, on the company to shew that the condition is reasonable; but the prima facie presumption, as against a person who has signed the special contract and made no declaration of the value of the dog to be carried, ought to be that, unless on the face of it the special rate is excessive, it is a reasonable one. If the plaintiff had declared the value of the dog and protested against the charge, possibly the case might have borne a somewhat different aspect; but it is hardly fair that, when he has acquiesced in the reasonableness of the contract by signing it, and has, by not declaring the value of the dog, contracted, as it were, on the footing of its not being worth more than 2*l.*, he should be allowed to turn round and assert that the special rate for the carriage of dogs of a greater value was excessive. But, apart from that consideration, there was sufficient evidence to shew that the special rate charged was reasonable. The evidence shewed that there was exceptional risk in the carriage of dogs by

railway, owing to their tendency to escape, and that the rate charged was the same as that charged by all other railways in the kingdom, having been fixed by the companies in concert in consequence of the decision in *Dickson* v. *Great Northern Ry. Co.* (1) It would be very difficult, if not impossible, to adduce any precise evidence in the way of figures with regard to the risk in respect of dogs, in order to establish the reasonableness of the charge made.

S. T. Evans, *K.C.*, and *Rhys Williams*, for the plaintiff. The authorities clearly shew that the onus of proving that the conditions of the special contract are just and reasonable under s. 7 of the Railway and Canal Traffic Act, 1854, lies on the railway company, and it is difficult to see how the fact of the plaintiff's agent having signed the contract can constitute evidence that the conditions are reasonable, or have any effect by way of shifting the onus. "Just and reasonable" in s. 7 of the Railway and Canal Traffic Act, 1854, means "just and reasonable as against the public," and has nothing to do with the conduct of a particular person. There was really no evidence in this case of any kind to shew that the particular rate charged by the defendants for dogs worth more than 2*l.* was a reasonable one, having regard to the risks incidental to the carriage of dogs, or the precautions necessary in their case; on the contrary the charge made is prima facie unreasonable, because it bears no relation to the distance for which the dog is to be carried. It is ultra vires for the railway company to act as an insurance company, and the rate, regarded as a compensation to the company for extra risk or trouble, is on the face of it exorbitant. In the present case the ordinary rate for dogs from Neath to Chesterfield was 4*s.*, but the special rate would have been 3*l.* 15*s.* extra, an amount nearly three times as much as the first-class passenger fare for the distance. Of course, in the case of very short distances, such as three or four miles, the disproportion would be much greater. It is on the face of it unreasonable to charge such a large extra rate, irrespective of distance: *Dickson* v. *Great Northern Ry. Co.* (1)

[EARL OF HALSBURY. The real ground of that decision seems

(1) 18 Q. B. D. 176.

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to have been, not that it was unreasonable to fix a rate irrespective of distance, but that the rate so fixed in that case, namely, 5 per cent., was beyond reason.]

The authorities shew that, in cases where the railway company seeks to qualify, or contract itself out of, its common law liability, it must offer a reasonable alternative to the customer, i.e., such terms as a prudent person might reasonably be expected to accept. No reasonable person could, in the case of a short distance, be expected to accept the alternative of paying 3*l.* 15*s.* for the carriage of the dog.

[BIGHAM J. Can it be assumed that the risk in the carriage of a dog necessarily varies in proportion to the distance? There might possibly be as much risk in the case of a short as of a long distance. The time occupied, the number of stoppages, and other such matters might all be factors going to the amount of risk.]

The distance must at least be one factor in estimating the risk, and the charge ought, at any rate to some extent, to have relation to the distance. The condition in this case has the effect of exonerating the company from the consequences of their own servants' negligence or wilful default as regards any amount beyond 2*l.*, unless the value is declared and the extra rate paid. That cannot be just and reasonable, unless the alternative offered is such as a reasonable man conceivably might accept: *Lewis* v. *Great Western Ry. Co.* (1); *Ashendon* v. *London, Brighton and South Coast Ry. Co.* (2); *Ronan* v. *Midland Ry. Co.* (3) There was here no evidence of any statistics with regard to the carriage of dogs by which to answer the question whether the percentage charged was reasonable or not.

[EARL OF HALSBURY. It may be doubted whether any such statistics exist.]

It may be difficult to provide such evidence, but the onus lies on the company of giving some evidence.

Sir R. B. Finlay, K.C., for the defendants, in reply. It is obvious that the risk bears little or no relation to the distance for which the dog is carried. There is nothing prima facie

(1) (1877) 3 Q. B. D. 195. (2) (1880) 5 Ex. D. 190.
(3) (1884) 14 L. R. Ir. 157.

unreasonable in a percentage rate. [He cited *Peek* v. *North Staffordshire Ry. Co.* (1); *Canada Southern Ry. Co.* v. *International Bridge Co.* (2); *Great Western Ry. Co.* v. *McCarthy.* (3)]

EARL OF HALSBURY. I regret that I am not able to agree with the conclusion arrived at by the learned judge in the Court below. I am not sure that I distinctly understand his view of the matter; but I have no doubt that the plaintiff's counsel has correctly expounded his observations, and they seem to be open to the remark that the learned judge did not specify the particular kind of evidence which he would require in order to satisfy him that the conditions imposed by the defendants in respect of the carriage of dogs were reasonable. I must say, speaking for myself, that I think the evidence given for the railway company was such as may fairly be regarded as sufficient for the purpose of drawing an inference as to whether the special contract was reasonable or not. It does not necessarily follow, taking the most extreme view, that a witness or witnesses must be put in the box to say that such or such a particular amount would be a reasonable rate for the carriage of a dog of such a value, if indeed that would be evidence at all. The sort of evidence which, I suppose, the learned judge meant would be evidence shewing what, in the case of dogs, is the nature of the risk; what is the amount of care given by the company, or which might reasonably be expected from them; what additional precautions they would have to take; and what additional expense might thereby be involved, and such like. Such evidence, though not in form directly applicable to the question what percentage would be reasonable, is evidence from which that may be inferred. When I look at the evidence here, and see that the company would have, in the case of such a dog as this, to send a special servant to take care of the dog, it appears to me eminently reasonable that they should make a percentage charge; and, that being so, the question whether the particular percentage charged is reasonable or not may, no doubt, involve some difficulty, as being a matter of estimate, as to which

(1) (1863) 10 H. L. C. 473. (2) (1883) 8 App. Cas. 723.
(3) (1887) 12 App. Cas. 218.

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opinions may to some extent vary. In my opinion there was evidence here leading to the conclusion that this was in itself a very reasonable condition for the railway company to impose. I think any ordinary person would say that, if there is a very valuable article to be conveyed, and therefore exceptional risk to be incurred, it would be a reasonable thing to insist on a special contract by which the persons who are to undertake to carry it safely should be indemnified by the amount which they are to receive for its carriage. I do not know why it is said that the amount of the rate fixed in this case was unreasonable. I think it has been sufficiently pointed out in the course of the argument that, with regard to such a subject-matter, it is impossible to lay down any precise canon by which to estimate the amount that will be reasonable. The matter must be looked at as a matter of business, as it is. The question is, Has a reasonable alternative been given to the person who is sending this valuable animal? If so, and he will not take it, it is his fault. The railway company have said that they will be liable in respect of loss or damage up to a certain amount, but that, if he desires them to undertake responsibility to a larger amount, he must pay this percentage rate. Now what are the facts of the case with regard to the reasonableness of the rate? The learned counsel for the plaintiff relied very much upon the decision in *Dickson* v. *Great Northern Ry. Co.* (1) as shewing that the rate charged was unreasonable, but I think, when that case is examined, the inference to be drawn from it is against his contention. No doubt it was there held that a rate of 5 per cent. was unreasonable, but that was only upon the ground that the percentage was too high. But, upon that having been decided, the representatives of the railway companies appear to have met together and agreed among themselves to reduce the rate to $1\frac{1}{4}$ per cent. I should say that the fact that they had so met, and, with that case before them, endeavouring to meet the law therein laid down, had arrived at the conclusion that this percentage was a reasonable one, and the fact that this rate so arrived at has been charged for the last sixteen or seventeen years without ever having been challenged or objected to till now, were in

(1) 18 Q. B. D. 176.

themselves some evidence of the reasonableness of the charge. If it were necessary to discuss further the case of *Dickson* v. *Great Northern Ry. Co.* (1), which, however, is binding on us in this Court, I might not be prepared to agree with all that was said in that case; but that is another matter, and I do not deal with it. Such being the condition of things, I look in vain to find any substantial argument to shew that this was not a reasonable condition; and, under these circumstances, I cannot say that I appreciate the point of view of the learned judge when he said that he could not find that this condition was unreasonable, and yet that he could not find that it was reasonable, but evidence might have enabled him to do so. I think that there was reasonably sufficient evidence that this was a reasonable condition, and I so find.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion. Walton J. was obviously in some doubt, as appears from the language to which my Lord has just referred, but I must say I think that, when the evidence given on behalf of the defendants is considered, there is ample ground for saying that the rate charged by them was reasonable. The evidence discloses the fact that all the railway companies in the United Kingdom have, in the case of dogs, adopted a similar rate; and that that rate has prevailed for the last sixteen or seventeen years, and has been paid in a large number of cases, apparently without any objection, for I do not gather that there has ever been any question raised with regard to it until the present case. Then, with regard to the other facts of the case, it appears from the evidence that there is exceptional risk in carrying an animal such as a dog, far greater than would be involved in carrying a passenger, and that the company even consider that, in the case of a very valuable animal, it would be necessary to send some one specially in charge of it. Then, further, the distance for which the animal is carried is not necessarily the measure of the risk, for the risk may be just as great on a short journey as on a long one; and lastly, in my opinion, a reasonable alternative is given by the terms of the contract to the sender of the dog.

(1) 18 Q. B. D. 176.

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On those grounds I think there is ample evidence to justify the conclusion at which my Lord has arrived, and with which I agree.

BIGHAM J. I agree. If the reasonableness of this condition is to be ascertained with reference to the evidence which was given, then I think its reasonableness has been established. But, even if the question is to be considered apart from the evidence, I should be prepared to hold that this condition is on the face of it reasonable.

Appeal allowed.

Solicitor for plaintiff: *T. J. David.*
Solicitors for defendants: *Beale & Co.*

E. L.

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[IN THE COURT OF APPEAL.]

HOWE, APPELLANT; LICENSING JUSTICES OF NEWINGTON, RESPONDENTS.

Licensing Acts—Renewal of Licence—Reference to Quarter Sessions—Report of Licensing Justices—Matters not stated in Report—Evidence—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

On the hearing by a committee of quarter sessions of an application for the renewal of a licence which has been referred to quarter sessions by the licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, evidence as to the structural condition and the state of repair of the premises in question is admissible for the purpose of differentiating the premises from other licensed premises in the neighbourhood, although there is no mention of those subjects in the report of the licensing justices.

So *held*, affirming the judgment of a Divisional Court, [1907] 2 K. B. 340.

APPEAL from the judgment (1) of a Divisional Court (Lord Alverstone C.J., Darling J., and Phillimore J.) upon a case stated by the committee appointed by the Court of quarter sessions for the county of London in pursuance of the Licensing Act, 1904.

(1) [1907] 2 K. B. 340.

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At a duly appointed principal meeting held on July 3, 1906, at the Sessions House, Newington, the question of the renewal of the licence theretofore held by the appellant in respect of the Duke of Edinburgh beer-house, 92, Lower Park Road, Camberwell (an ante-1869 privileged beer-house), came up for consideration under the Licensing Act, 1904, before the county licensing committee appointed by the Court of quarter sessions for the county of London.

After hearing evidence on behalf of the renewal authority, and also on behalf of the appellant and the owners of the house, the committee refused the renewal of the licence, subject to this case.

The facts stated in the case were to the following effect :—

On February 12, 1906, a notice requiring the attendance of the appellant in person at the adjourned general annual licensing meeting of the justices was served by the justices' clerk on their behalf upon the appellant, giving as the ground for the requisition that the appellant's licence was not required having regard to the character and necessities of the neighbourhood.

On February 21, 1906, the adjourned meeting was held, and the justices, having heard evidence with regard to the Duke of Edinburgh beer-house, were of opinion that the question of the renewal of the licence required consideration, on the ground that the licence was not required, and the justices referred the matter of the renewal to quarter sessions, with their report thereon.

The report stated, with regard to the Duke of Edinburgh, that "this beer-house was originally two cottages, the bar being built upon the forecourt, and there have been four transfers in the last four years. There are twenty-three on licences within the quarter-mile radius, and a fully licenced house, which is now being re-built, within 100 yards."

At the hearing before the committee on July 3, 1906, evidence was given on behalf of the renewal authority as to the number of licensed houses in the immediate vicinity of the Duke of Edinburgh. The renewal authority then tendered evidence as to the structural condition and state of repair of the Duke of Edinburgh for the purpose of shewing why the licence of this

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house in particular, as compared with the licences of two other licensed houses close by, was not required. Objection was taken on behalf of the appellant that the evidence was not admissible, upon the ground that no complaint was made in the report of the renewal authority as to the structure of the premises or their state of repair, and that the appellant consequently had had no notice that evidence would be given as to these matters.

The committee were of opinion that the evidence was admissible, and evidence was then given as to the structure of the premises and their state of repair, as compared with the two other licensed houses, and, after hearing evidence on behalf of the appellant and the owner of the house as to the trade done in the house and the character of the neighbourhood, the committee refused the renewal of the licence, subject to this case.

The question for the opinion of the Court was whether the evidence objected to was admissible.

The Divisional Court answered that question in the affirmative.

Low, *K.C.*, and *Wootten*, for the appellant. Evidence of matters which are not mentioned in the report made by the renewal authority to the quarter sessions is not admissible before the committee of quarter sessions. The scheme of the Licensing Act, 1904, and of the rules made under that Act, is that the question of renewal shall be considered by the committee of quarter sessions solely with reference to the considerations referred to in the report. The report constitutes really the statement of the grounds upon which it is suggested that the licence shall not be renewed—what may be called the indictment against the licensed premises—and r. 16 of the Licensing Rules, 1904, provides that the licensee and the owner of the licensed premises shall be entitled to have a copy of the report, obviously in order that they may know what the case which they have to meet will be. If other matters may be sprung upon them before the committee of the quarter sessions, they may be unprepared to meet them. There was no complaint in the report as to the structure or condition of repair of the premises in this case.

Avory, *K.C.*, and *Cecil Whiteley*, for the respondents, were not called upon to argue.

EARL OF HALSBURY. The point taken by the appellant appears to me to be altogether untenable.

SIR GORELL BARNES, PRESIDENT, and BIGHAM J. concurred.

Appeal dismissed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitor for respondents: *Sir Richard Nicholson.*

E. L.

[IN THE COURT OF APPEAL.]

GLENIE *v.* BRUCE SMITH.

Bill of Exchange—Indorsement by way of Security—Signature in blank—Bill not complete and regular on Face of it—Estoppel—"Holder in due Course"—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 20.

The defendant entered into an agreement with the plaintiff to guarantee the payment by T. for goods sold to him by plaintiff, and for that purpose to indorse bills accepted by T. for the amount. In pursuance of that agreement T. wrote his acceptances across the face of two blank stamped bill forms, and the defendant indorsed them. T. then handed the bill forms to the plaintiff, who filled up the body of the bills for the agreed amount, making them payable to his order, signed them as drawer, and also indorsed them. The plaintiff duly delivered the goods to T., who eventually was unable to pay for them:—

Held, that as the defendant agreed to be liable for the price of the goods supplied by the plaintiff to T., and indorsed the bills for that purpose, he was liable on these bills.

Decision of A. T. Lawrence J., [1907] 2 K. B. 507, affirmed.

APPEAL from a decision of A. T. Lawrence J. (1)

The action was brought against the defendant Bruce Smith, as indorser of two bills of exchange for 91*l.* 9*s.* and 124*l.* 11*s.* respectively. The plaintiffs were the sons and executors of the drawer, Charles Glenie. The defendant Smith was sued as an indorser of both bills. The defendant Tucker, who was the acceptor of the bills, was a farmer and tenant of the defendant Smith. In 1903 Tucker, who had had swine fever upon his

(1) [1907] 2 K. B. 507.

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farm, was in financial difficulties, and was indebted to Smith for rent and otherwise. The deceased Charles Glenie had for some years had transactions with Tucker in pigs, Tucker's farm being what he called a "pig farm." In consequence of Tucker's being unable to pay for some pigs he had bought from Glenie, it was suggested that Tucker should get his landlord, the defendant Smith, to back a bill for the price of the pigs. One of the plaintiffs, on behalf of his father, saw Smith and asked him whether he was prepared to become responsible for the price of pigs to be delivered to Tucker. The defendant said that he was, and expressed great confidence in Tucker's future success. This occurred in 1903, and the defendant indorsed bills for the amount of the price of the pigs. In the years from 1903 to 1906, both inclusive, many transactions took place upon this footing. In each case the acceptance by Tucker and the indorsement by Smith were placed on a blank bill form. This form was then handed to the deceased for the purpose of his getting it filled up as a bill of exchange. The body of the bill was afterwards filled up by the deceased Charles Glenie. These bills, until 1906, were duly met, and no question arose upon them. In September, 1906, the two bills now in question were so given. The one was filled up for 91*l.* 9*s.* and the other for 124*l.* 11*s.*, with the deceased's name as drawer, and, in the case of the latter, with his name as indorser placed below that of the defendant Smith instead of above it. Whether or not the deceased had made the previous bills in the same form did not appear. Some question was raised about notice of dishonour, but it was proved that Smith had notice before the bills became due that they could not and would not be met by Tucker, and immediately afterwards that they had not been met. Lawrence J., in a considered judgment, held that, having regard to the agreement between the parties, the bills must be treated as though they had been indorsed by Glenie to the defendant without consideration, and then re-indorsed by the defendant to Glenie in consideration of the delivery of the pigs, and that under those circumstances the defendant was, upon the authority of *Wilkinson* v. *Unwin* (1), precluded from setting up the defence that Glenie

(1) (1881) 7 Q. B. D. 636.

himself was a previous indorser; and that by reason of the agreement the defendant was also precluded from setting up the defence that at the time the defendant indorsed the bills they were not complete and regular upon the face of them. His Lordship, therefore, gave judgment for the plaintiffs. The defendant Bruce Smith appealed.

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The appeal was heard on December 10.

E. A. Harney, for the appellant. It must be admitted that the defendant intended to make himself liable, and that the giving of the blank bill form with the signature on the back was an authority under s. 20 of the Bills of Exchange Act, 1882, to fill the form up in any way Glenie chose, so as to make the defendant liable. The bill might have been made a bearer bill or an order bill payable to the defendant, when the defendant would have had no defence. Through a mistake in judgment Glenie made the bill to his own order; he consequently only held an order bill which had not been negotiated, and the defendant was a stranger to it. Such a stranger is only liable to a holder in due course: s. 56; and the holder in due course should be a person who had no notice of the defect: s. 29; and Glenie had notice of the defect.

In *Matthews* v. *Bloxsome* (1) the facts were very much the same as in this case, and it decided that the defendant was not liable as indorser, but that he could be deemed to have been a drawer of a bearer bill held by the plaintiff. In *Steele* v. *M'Kinlay* (2) that decision was doubted, and it was held that the defendant there could not be treated as having signed otherwise than as indorser, and as such was not liable, since he was a stranger to the bill and the plaintiff had notice. In *Jenkins & Sons* v. *Coomber* (3) the same point was decided, and the decision is only an authority for shewing that the Bills of Exchange Act, 1882, did not alter the law merchant.

Estoppel does not apply in this case, because Glenie knew of the defect set up when he became the holder. There is no case of estoppel that does not involve an innocent plaintiff. In

(1) (1864) 33 L. J. (Q.B.) 209. (2) (1880) 5 App. Cas. 754.
(3) [1898] 2 Q. B. 168.

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Lloyd's Bank, Ld. v. *Cooke* (1) a maker of a promissory note was estopped from denying the validity of the bill as against the payee, but the defect there was one of excess of authority in the filling up, a defect unknown to the plaintiff. For these reasons the plaintiffs are not entitled to recover.

M. Shearman, K.C., and *Ernest Todd*, for the plaintiffs, the respondents, were not called upon.

COZENS-HARDY M.R. Notwithstanding the very able argument which has been addressed to us by the appellant's counsel, I am clearly of opinion that the judgment of A. T. Lawrence J. was perfectly correct.

The material facts are very short indeed. [Having stated them, the Master of the Rolls continued:—] Under these circumstances, having regard to the Bills of Exchange Act and to the settled common law principles of the law of estoppel, it seems to me that the plaintiff is plainly right. That the plaintiff is the holder of the bill and the holder in due course prima facie is plain by s. 30 of the Bills of Exchange Act, 1882, and no evidence has been given even to suggest anything to the contrary.

Sect. 20 is the section which was, as it seems to me, intended to deal, and plainly does deal, with the case of a simple signature. It says: "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit. (2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all

(1) [1907] 1 K. B. 794.

purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

Now, what is the meaning of that section applied to the facts of this case? It seems to me that the defendant is really estopped from saying that his name was put as indorser on that bill before the drawer, Glenie, had made it an open bill upon which the plaintiffs sued. The very object and intent of that section was that it should not be open to give evidence, in a case of this kind, that a bill was other than that which on its face it purported to be. Of course, if there had been any breach of authority, if there had been any transgression of any of the instructions given to Bruce Smith, different considerations would arise; but here it does seem to me that nothing was done which was not authorized to be done. A. T. Lawrence J. said (1): "It was urged that Charles Glenie, being the drawer of the bills, could not sue the defendant, but I think that as the bills were indorsed in pursuance of the agreement above mentioned, and were made out with the defendant's authority, he cannot set up this defence." Then he says (2): "It was then urged that the bill, having been indorsed in blank, was invalid. I think the defendant is equally estopped from setting up this defence."

I do not think it really necessary to go through the various authorities which have been cited. With reference to *Jenkins & Sons* v. *Coomber* (3), that was a case in which s. 20 was not cited or referred to either by counsel or the judge, and for a very good reason, namely, that s. 20 could have no application, because it was a case altogether outside that section.

In my judgment A. T. Lawrence J. was perfectly right in the view he took, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion.

The logical order of operations with regard to a bill is, no doubt, that the bill should be first filled up, then that it should be signed by the drawer, then that it should be accepted, then that it should be negotiated, and then that it should be indorsed by the

(1) [1907] 2 K. B. 507, at p. 510. (2) Ibid. at p. 511.
(3) [1898] 2 Q. B. 168.

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Fletcher Moulton L.J.

persons who become successively holders; but it is common knowledge that parties very often vary, in a most substantial manner, the logical order of those proceedings, and s. 20 of the Bills of Exchange Act is intended to deal with those cases. That section says that where a person signs his name on a blank stamped sheet of paper, and delivers it in order that it may be converted into a bill, it prima facie gives authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or an indorser; and in like manner when a bill is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit. If you choose to anticipate the logical order of events and give that uncompleted document to a person in order that it may be made a complete bill, then he has a prima facie authority to fill up the omission.

With regard to the rights of the parties, as against persons who do not become parties to the bill until after it is complete, it is a complete bill, and all the ordinary rules of law with regard to complete bills apply. Their case therefore does not need to be dealt with specially. It is sufficient to say that the bill is enforceable in the hands of a holder in due course.

Now we come to the case of those who become parties to the bill while it is still incomplete. Their rights are limited and are defined very clearly in the second paragraph of s. 20, which says: "In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion"—that is, while it was still incomplete—"it must be filled up within a reasonable time, and strictly in accordance with the authority given." The plain meaning of that enactment is that in the case of a bill so filled up persons have just the same rights as persons in the same position with regard to an ordinary bill, provided there has not been a de facto exceeding of the authority, and provided that the bill is filled up in a reasonable time. Here it is admitted that both these conditions are fulfilled; and therefore a party, even though he knew all the circumstances of the case, and even though he became a party to it while it was still incomplete, is entitled to

all the rights of a holder in due course of an ordinary bill if he occupies that position with regard to this bill. I cannot see why Glenie did not occupy that position. He was admittedly the holder; and a holder is to be deemed prima facie the holder in due course. It is suggested that evidence can be brought to shew that he was not the holder in due course. To what does that evidence relate? It is evidence of the variation of the order in which these operations were performed. That is the very point which the section says that the defendant may not raise. The delivery of the blank sheet of paper with his name on and stamped authorized those operations to be done in any order, and he is estopped from saying that they were not done in the proper order.

The case may be put in this way—it is admitted that if the bill had been made payable to bearer the defendant would have been liable. It was made payable to A. B. and A. B. indorsed it generally; so that it became exactly the same thing as a bill payable to bearer. It is suggested, for some reason which Mr. Harney frankly says is wholly destitute of merit, that we are to hold that he is not liable in that case. I can see no reason for so holding. In my opinion the decision is right and the appeal must be dismissed.

FARWELL L.J. I agree. I have nothing to add.

Appeal dismissed.

Solicitors: *Woodbridge & Sons; Swann, Bradley & Co.*

W. C. D.

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Dec. 12, 13.

[IN THE COURT OF APPEAL.]

YUILL & CO. *v.* SCOTT ROBSON.

Sale of Goods—Contract for Sale of Cattle at Price including Cost, Freight, and Insurance—Contract by Seller to insure Cattle "against all Risks"—Warranty in Policy against "Capture, Seizure and Detention"—Slaughter of Cattle in consequence of Government Prohibition against Landing—Liability of Seller.

Cattle were bought at Buenos Ayres, at a price including cost, freight, and insurance, for shipment to Durban; by the contract of sale the seller was to insure the cattle "against all risks." The seller obtained, and handed to the buyer, a policy of insurance which was an ordinary "all risks" Lloyd's policy, but which, in accordance with the usual practice among insurance brokers and underwriters with regard to such policies, contained a warranty against "capture, seizure and detention, and the consequences thereof." Disease broke out among the cattle on the voyage, and on arrival at Durban the authorities forebade their landing, and the cattle were consequently slaughtered. The underwriters having refused to pay upon the policy, except in regard to risks not affected by the warranty, the buyer brought an action against the seller to recover damages for breach of contract to insure the cattle "against all risks":—

Held, that the contract was not satisfied by the procuring of a policy which did not protect the buyer from loss arising in consequence of the cattle not being allowed to land, and that the seller was, therefore, liable to the buyer in damages for breach of contract.

Decision of Channell J., [1907] 1 K. B. 685, affirmed.

Appeal of the defendant from the judgment of Channell J. in an action tried in the Commercial Court without a jury (reported [1907] 1 K. B. 685).

The action was brought to recover damages for breach of a stipulation in a contract for the sale of bullocks under the following circumstances. The contract was contained in two letters, dated April 4, 1903, written at Buenos Ayres by one Miskin, the plaintiffs' agent, and the defendant respectively, by which the defendant agreed to sell, and the plaintiff to buy, 250 bullocks at 17*l.* a head, to include cost, freight, and insurance, for shipment by the steamer *Abbey Holme* to Durban; the contract contained a stipulation that the bullocks were to be insured by the defendant "against all risks." The

bullocks were duly shipped by the defendant and the price paid by the plaintiffs. On the voyage of the *Abbey Holme* to Durban foot-and-mouth disease broke out among the cattle, with the result that on arrival at Durban the authorities forbade the landing of the cattle, which were consequently slaughtered and their carcases sold at 5*l.* a head. The plaintiffs thereupon gave notice of abandonment to the underwriters, alleging a constructive total loss of the bullocks, but the underwriters refused to pay the plaintiffs' claim, amounting to 3829*l.*, on the ground that the policy taken out by the defendant for the plaintiffs under their contract contained an exception of losses occasioned by "capture, seizure and detention and the consequences thereof."

An action by the plaintiffs on the policy was compromised for 990*l.* (representing principally the value of cattle which had died on the voyage), and the plaintiffs sought in the present action to recover the difference of 2839*l.*, with the costs of the action against the underwriters, making a total of 2986*l.*, as damages for the breach by the defendant of his undertaking to procure for the plaintiffs an insurance of the bullocks against all risks. The defendant contended that he had procured a policy which satisfied the terms of the contract, and which had been accepted by the plaintiffs and by their agent to whom it was delivered. The policy procured by the defendant was an ordinary Lloyd's policy with special clauses attached. The clause in controversy was printed in italics, but by a note was to be construed as if it had been written, and was in these terms: "Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." Certain typewritten clauses, called "All risks live stock clauses," were attached to the policy, of which the important one ran: "To cover mortality, jettison, washing overboard, and risks of every kind from time of arrival at wharf and until delivered to consignees, but free of all claim for particular average and depreciation of animals which walk ashore (or after release from the slings) at destination, unless caused by or in consequence of

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the vessel craft or cargo being stranded, sunk, burnt, or on fire or by collision or by disablement of steamer. . . . ." The defendant further pleaded that, in the absence of special instructions, it was a usual and well-known custom to include in marine policies against all risks the warranty "free of capture, seizure or detention," and that the custom was, or ought to have been, well known to the plaintiffs. The defendant took out a summons for leave to take evidence on commission in Buenos Ayres as to the meaning of the expression "insurance against all risks," as understood by persons in the cattle trade. No order was made on the summons, but it was reserved for the judge at the trial to say whether the commission should be granted. At the trial Channell J. refused to allow the commission. Evidence was given on behalf of the defendant by several London underwriters and insurance brokers to prove the custom with regard to a policy "against all risks," and to shew that the usual course was to effect a separate insurance against the risk of the landing of cattle being prohibited by the authorities of the country or place to which they were consigned.

Channell J. gave judgment for the plaintiffs.

The defendant appealed.

J. A. Hamilton, K.C., and *Lewis Noad*, for the defendant. The stipulation in the contract that the insurance was to be "against all risks" is one which must obviously be read subject to some limitation, for no insurance is ever given absolutely against all risks. Every policy contains some exceptions, such as, for example, inherent vice, or free of particular average under 3 per cent. The words "all risks" in a mercantile document, therefore, cannot be read in an absolute sense, and evidence was admissible to prove what risks are, in the absence of any special bargain, usually insured against. The evidence of the defendant's witnesses proved conclusively that an "all risks" policy on cattle is always understood in the insurance world as one which includes the warranty free from capture, seizure, and detention, unless express instructions to the contrary are given and an additional premium is paid. On the other hand, if this contract is to be construed with reference to the meaning which would

be placed upon it by persons in the cattle trade at Buenos Ayres, the defendant ought to have been allowed to take evidence on commission in Buenos Ayres. Further, the evidence shews that the proposed form of policy was shewn to the plaintiffs' agent and was accepted by him as being in compliance with the requirements of the contract. The plaintiffs are not entitled to say now that the defendant did not obtain for them a policy of insurance as stipulated for.

Scrutton, K.C., and *F. D. Mackinnon*, for the plaintiffs. If the language of the letters constituting the contract is read in its ordinary and natural meaning, as it ought to be in a contract of this kind, it is wide enough to cover a policy protecting the plaintiffs against loss of cattle through being prevented from landing, which is one of the most ordinary risks in the cattle trade. The expression "insurance against all risks" is not used in the contract in any technical sense, and the case is not one in which evidence is admissible to explain the meaning of the contract. [They referred to *Miller* v. *Law Accident Insurance Co.* (1); *Schloss* v. *Stevens.* (2)]

J. A. Hamilton, K.C., replied.

Lord Alverstone C.J. In my opinion the conclusion at which Channell J. arrived in this case was perfectly right. The question turns on the meaning of the stipulation in the contract that the cattle were to be insured by the defendant against all risks. It is contended on behalf of the defendant that the expression "all risks" must be subject to some limitation. Speaking for myself, I do not think that it is necessary, in deciding this case, to say whether or not that proposition might not be correct in certain cases, but when considering the meaning of the words as used in this contract I cannot do better than adopt the language of Channell J. He said: "No doubt the evidence clearly shews that an insurance broker would expect a policy against all risks to contain the warranty against capture, seizure, and detention; but the question as between the buyer and seller of goods is a very different one indeed, and I very

(1) [1903] 1 K. B. 712. (2) [1906] 2 K. B. 665.

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much doubt the admissibility of the evidence given on behalf of the defendant. I think that in the present case the expression covers insurance against a risk so obvious to parties buying and selling live cattle for shipment as that of the cattle being prevented from landing at their destination by reason of the apprehension of the authorities of the importation of disease. Such a prohibition is very usual, and the risk would naturally be present to the minds of persons in the position of the plaintiffs and the defendant." I can only say that I entirely agree with that statement. But it is said that in the cattle trade the words "insurance against all risks" have acquired a secondary and special signification, and that the parties to this contract must be taken to have known that an insurance against all risks would not include all risks, but would exclude the particular risk of a prohibition against the landing of the cattle by an order of the authorities in the country to which they were to be sent.

It is said that there are two kinds of policy in use, one of which does not contain the free of capture, seizure, and detention warranty, and that, if a policy in that form is desired, an additional premium has to be paid. We are also told that if the slip does not contain the words "no free of capture, seizure, and detention warranty," it is the practice for underwriters to insert the clause in the policy. That may be a very reasonable and proper practice, but to my mind it to a great extent negatives the suggestion that the words "all risks" have acquired a special secondary meaning binding on the parties to this action. Throughout Mr. Hamilton's argument I had great difficulty in seeing how any question could be framed which would establish that the words had acquired a secondary meaning in the cattle trade. He contended that the words must be subject to some limitation because otherwise they would be wide enough to cover loss due to inherent vice. I do not follow that argument. The policy, which was tendered and which was assumed by both parties to be an all risks policy, contained what are known as the "all risks live stock clauses," one of which, the "mortality" clause, contained certain stipulations limiting the insurer's liability in certain events. The argument for the

defendant has not satisfied me that the words "insurance against all risks" in this contract must be read subject to a limitation; but, in any case, I agree with Channell J. that it was necessary in order to comply with the contract to tender a policy which would protect the assured against the whole venture being frustrated by reason of a prohibition against the landing of the cattle at Durban. The policy which was in fact tendered contained the warranty against capture, seizure, and detention, and the cattle having been prevented from landing by the authorities at Durban, the case of *Miller* v. *Law Accident Insurance Co.* (1) decides that that loss was not recoverable under a policy in that form. For the reasons which I have given I am of opinion on the main point that the plaintiffs were not bound to accept the policy which was tendered.

Another point was raised on behalf of the defendant. It was said that because the form of policy was shewn to the plaintiffs' agent in London a few days before the cattle were shipped, the plaintiffs were precluded from now saying that they were not bound to accept that policy. In my opinion the conversation which took place on that occasion with the agent clearly shewed that the agent had not examined the policy from the point of view of deciding whether he would accept it or not, and it is impossible to suggest that there is any evidence that the agent then acted in such a way as to estop his principals from saying that the policy tendered was one which did not fulfil the requirements of the contract. For these reasons I am of opinion that this appeal must be dismissed.

BUCKLEY L.J. I agree that the decision of Channell J. was right, and I cannot usefully add anything to his judgment.

KENNEDY L.J. I agree. It is clear from the letters that the defendant undertook to give the plaintiffs a proper policy of insurance, and further expressly contracted that that policy should be one covering the assured "against all risks." That phrase is used as an ordinary expression in a letter; it is not a

(1) [1903] 1 K. B. 712.

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case of a term of art being used, as might have been the case if the words had been "live stock insurance under an all risks policy," because it appears that there is a form of clause in use called an "all risks live stock clause." If the expressions used in the letters had shewn that that was the clause for which the plaintiffs were stipulating, the case would have been different, because that clause is to be found in policies which contain the free of capture, seizure and detention clause.

Prima facie, therefore, the plaintiffs were entitled under the contract to be insured against all risks. In fact they got a policy which did not insure them against this particular risk, which is a well-known and obvious one where cattle are being carried, and one which it has been decided is not covered by a policy containing the free of capture, seizure, and detention clause. It seems to me that Channell J. was right in saying that there was nothing in the evidence of the London underwriters sufficient to nullify the effect of the plain and simple and perfectly natural meaning of the words, having regard to the nature of the contract in which they appear. It is impossible to treat the subsequent conversation as in any way affecting the rights of the parties under the contract. The contract was an absolute one, and unless there was evidence of a waiver by the plaintiffs through their agent of the defendant's obligation to tender a policy in accordance with the terms of the contract, it stands for all purposes; and there is nothing in the evidence which affords any ground for saying that the plaintiffs' agent knowingly or intentionally said that he would accept a policy which gave the plaintiffs less protection than they were entitled to.

It has also been contended that the defendant ought to have been permitted to call evidence as to the meaning of the stipulation in the contract as to insurance as understood in Buenos Ayres. The proposed evidence might have been relevant if it could have been shewn that the parties were contracting with regard to the usual form of policy in use at Buenos Ayres for cattle; but the contract being an absolute one to give a policy of insurance against all risks, I am of opinion that the proposed evidence was not relevant and was inadmissible, and that

Channell J. was right in refusing to grant a commission to take evidence in Buenos Ayres.

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Appeal dismissed.

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for defendant: *W. A. Crump & Son.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Nov.* 14.

GREENE *v.* CROOME.

Practice—New Trial—Notice of Motion—Time—Action tried with Jury—Order XXXIX., *r.* 4.

Upon the trial of an action with a jury, the jury answered the questions of fact left to them by the judge, and were discharged. The judge then referred the question of the amount due to the plaintiff upon those findings to a special referee for report. Upon further consideration, after receiving the referee's report, the judge gave judgment for the plaintiff for a certain amount. Four days after the judgment, but a year after the verdict, the defendants gave notice of motion to the Court of Appeal for (inter alia) a new trial:—

Held, that the date to be regarded for the purpose of giving notice of motion for a new trial under Order XXXIX., r. 4, was the date of the findings of the jury, and not that of the judgment on further consideration, and that therefore the notice of motion, so far as it asked for a new trial, was out of time.

APPLICATION of the defendants for judgment or for a new trial.

It is unnecessary for the purposes of this report to state any facts beyond those necessary for the appreciation of the preliminary objection taken to the hearing of the application.

The action was tried before Lawrance J. and a special jury at the Gloucester Assizes on July 7 and 10, 1906. On the latter day the learned judge summed up the case and left certain questions to the jury, who answered some of them in favour of the plaintiff. The jury were then discharged, and Lawrance J. referred the question of the assessment of the amount due to the plaintiff consequent upon the findings of the jury to a special referee, who was to make his report to him on the matter. On

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February 20 and 21, 1907, the inquiry was held by the special referee, who on April 16, 1907, made his report. On July 27, 1907, the case came before Lawrance J. for further consideration on the referee's report, and he on the same day gave judgment for the plaintiff for 130*l*. On July 31, 1907, the defendants gave notice of motion to the Court of Appeal that judgment be entered for the defendants or for a new trial, and the motion was entered, as is usual in such cases, in the new-trial paper.

Vachell, K.C. (*H. M. Sturges* with him), for the plaintiff. There is a preliminary objection to the hearing of this application on the ground that the notice of motion was out of time. Under Order xxxix., r. 4, if the trial has taken place elsewhere than in London or Middlesex, the notice of motion for a new trial must be served "within seven days after the last day of sitting on the circuits for England and Wales during which the trial shall have taken place." So far as this application is one for a new trial, it is an appeal from an issue determined by the jury, and the time fixed by the rule runs from the date of the finding and the discharge of the jury, and not from the date of the judgment on further consideration. *Shaw* v. *Hope* (1) is a clear authority to this effect. If it is objected that in such cases as the present this would mean taking a step by way of appeal before judgment was pronounced, the answer is that the time for hearing the motion for a new trial could be enlarged until after the judgment on further consideration had been delivered. Nor is it unusual to appeal from the findings of the jury before judgment has been pronounced: *Allcock* v. *Hall* (2), in which case the Court of Appeal heard and determined an application for a new trial although no judgment had been pronounced by the learned judge who tried the case.

[He was stopped by the Court.]

Acland, K.C., and *Cranstoun*, for the defendants. The notice of motion was in time. By Order xxxix., r. 1, a motion for a new trial, where there has been a trial without a jury, must be made by way of appeal to the Court of Appeal, and by

(1) (1877) 25 W. R. 729. (2) [1891] 1 Q. B. 444.

r. 1A of that order, where the trial has been with a jury, motions for a new trial are to be entered in the Court of Appeal in the same way as motions by way of appeal where there has been a trial without a jury; they are also to be subject to the provisions of Order XXXIX., r. 4, and are to be brought before the Court of Appeal in like manner as an appeal. The manner in which appeals are to be brought to the Court of Appeal is dealt with in Order LVIII., r. 15, which in substance provides that no appeal from an interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, which period is (in such a case as the present) to be calculated from the time "at which the judgment or order is signed, entered, or otherwise perfected." The time for giving notice of motion, therefore, ran from the date of the judgment of Lawrance J. Assuming, however, that the case comes within Order XXXIX., r. 4, the terms of that rule have been complied with, for the word "trial" as there used includes the completion of all matters which are necessary to the pronouncing of final judgment by the presiding judge, and therefore includes the dealing with the referee's report on further consideration.

THE COURT (Vaughan Williams L.J., Sir Gorell Barnes, President, and Bigham J.), without delivering a formal judgment, held that, so far as the application for a new trial was concerned, the preliminary objection was good. They then proceeded to hear the application so far as it was an appeal from the judgment of Lawrance J., and dismissed it without calling on counsel for the respondent (the plaintiff).

Appeal dismissed.

Solicitor for plaintiff: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

Solicitors for defendants: *Burton, Yeates & Hart, for E. C. Davis, Stroud.*

W. J. B.

C. A.
1907
Nov. 22, 23.

[IN THE COURT OF APPEAL.]

DE LA BERE *v.* PEARSON, LIMITED.

Contract—Consideration—Breach of Duty to take care—Damages—Remoteness—Intervening Criminal Act of Third Party causing Loss.

The defendants, who were newspaper proprietors, advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff, a reader of the paper, wrote to the defendants' city editor asking for a safe investment for 800*l.*, and also for the name of a "good stockbroker." The editor recommended a person who, as he well knew, was an "outside broker," that is, a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. The outside broker had for some months been employed by the editor to advise him on matters connected with the financial correspondence in the defendants' newspaper, and there was no evidence that the editor had any reason to suspect his honesty. The outside broker was, in fact, an undischarged bankrupt, a fact which was unknown to the editor, who might, however, easily have ascertained his financial position if he had made inquiries. The plaintiff, in reliance on the editor's recommendation, sent sums of 1300*l.* and 100*l.* for investment to the outside broker, who immediately misappropriated them:—

Held, that there was a contract between the plaintiff and the defendants by which the defendants undertook to use reasonable care that the person recommended as a broker should answer the description of a good stockbroker; that the defendants' city editor, in recommending the outside broker without making reasonable inquiries about him, had committed a breach of that contract; and that the plaintiff's loss naturally flowed from the defendants' breach of contract, even if the misappropriation of the money by the broker amounted to a criminal offence.

Held, also, by Vaughan Williams L.J. and Sir Gorell Barnes, President (Bigham J. doubting), that the measure of damages was not limited to the 800*l.*, but that the plaintiff was entitled to recover the actual amount of his loss.

Appeal from a decision of Lord Alverstone C.J., reported [1907] 1 K. B. 483.

The following statement of the facts is taken from the judgment of the Lord Chief Justice:—

The defendants are the proprietors of a paper called *M.A.P.* This paper, which has a very considerable circulation, has for many years been in the habit of publishing in each issue

paragraphs under the head of "M.A.P. in the City," followed by the words "Spare Cash and Advice.—Readers of *M.A.P.* desiring financial advice in these columns should address their queries (with full name and address) to the City Editor, 17 Henrietta Street, Covent Garden, W.C." The plaintiff, who was a reader of the paper, and had, according to his evidence, been in the habit of reading it for a considerable time, wrote to the city editor a letter in the following terms: "Bishop's Stortford, March 6, 1905. Dear Sir,—I should feel greatly obliged if you will kindly advise me how I can best invest 800*l.* in two or three fairly safe securities to pay not less than 5 per cent. I see in your last issue you recommend Chelsea Electric, which pays nearly 5. Can you suggest any other better than this, some home industries? and oblige, Yours faithfully, K. B. Baghot de la Bere. Please also name good stockbroker. If you only reply in *M.A.P.*, please do so under 'Rex,' not my full name." This letter was handed by the city editor to a person of the name of Thompson, who traded as an outside broker under the name H. Hughes & Co. at 16, Royal Exchange, and who on March 20 wrote to the plaintiff in the following terms: "Dear Sir,—The editor of *M.A.P.* regrets that his reply to yours of the 6th inst. has been crowded out of the paper, and so requests us to write to you. We may state that we transact most of his business for him, and upon his recommendation shall be very pleased to do what we can in your interests.—Yours truly, H. Hughes & Co." The plaintiff replied to this letter, but his reply has not been preserved, and he kept no copy. On March 24 Thompson, under the name of Hughes & Co., wrote the following letter: "Dear Sir,—We are in receipt of yours of yesterday's date and thank you. We do not think you could have a much better list than that sent you the other day; there were nine different shares mentioned, and if you were to buy twenty-five Aux Classes Laborieuses, and twenty-five Waring & Gillow, and 100 of each of the others the cost would work out at about 1100*l.* If you should then have any little sum over for speculative purposes you might put it into Nile River Syndicate, which we consider likely to go much higher in price. The present quotation is

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about 6*s.* 3*d.* Our rates of commission are just the same as with ordinary brokers, and may be reckoned as about threepence for every pound in value. . . . . You say in your letter that you wish to act quickly, and we should have bought for you to-day, but could not quite read your letter as a definite order. Perhaps you will let us have this in course, when we shall be pleased to do our best for you. Yours truly, H. Hughes & Co." On March 27 the plaintiff sent to Hughes & Co. at 16, Royal Exchange, two cheques, one for 800*l.* and one for 500*l.*, which Thompson, under the name of Hughes & Co., acknowledged. On April 1 and April 8 Hughes & Co. sent to the plaintiff contract notes for the purchase of industrial securities of a total value of 1230*l.*, and on May 4 and May 8 further contracts for 114*l.* 11*s.* and 118*l.* 1*s.* respectively, and on May 5 the plaintiff sent to Hughes & Co. a further cheque for 100*l.* No complaint was made of the character of the shares in which Hughes & Co. had suggested that the plaintiff's money was to be invested; they had in fact been selected by the defendants' city editor. But Thompson was called as a witness and admitted that he had not bought any shares, and that the cheques for 800*l.* and 100*l.* were paid to his wife's account at Barclay's Bank, on which he was entitled to draw, and the cheque for 500*l.* was paid away to some stockbrokers to whom he owed money. Thompson was an undischarged bankrupt, and therefore could not be a member of the Stock Exchange. The evidence with regard to the employment of Thompson was as follows: Mr. Horniman, the city editor of the defendants' paper, stated that he had been for six years up to July, 1905, financial editor of *M.A.P.*, and it was his duty to prepare the answers to correspondents, which answers were given either in the next or subsequent issues of the paper, or, not unfrequently, by direct communication. He stated that, as to a good many of the questions, he answered them himself, but as to a great many others he required advice; that in previous years he had consulted three separate firms of stockbrokers in succession, all of whom were members of the Stock Exchange and firms of repute. The terms arranged with those firms were that they should not receive any payment for such advice, but were to have the benefit of any introduction to clients who might be

obtained through the columns of *M.A.P.* or by answers sent in reply to their questions. He stated that the three firms of stockbrokers got tired of doing this, as it involved a great deal of work and did not lead to their obtaining many clients. He added that his practice was to recommend any one who asked for the name of a broker to the firm which was helping him. It was proved that Horniman had on several previous occasions recommended a firm of stockbrokers to correspondents, and given the names of the correspondents to the stockbrokers, with a view to their corresponding with them and so obtaining clients, as this was the only remuneration or reward which the brokers advising him obtained for their services. He stated that he had known Thompson very slightly since 1889, that he knew he was an outside broker trading under the name of Hughes & Co., and not a member of the Stock Exchange, and that for six months before March 4, 1905, Thompson had been advising him. He had shewn him the letters upon which he required advice, and had not unfrequently handed to him letters that he might reply direct to correspondents, and he had told him that he would do what he could to help him, and that he should have any clients that could be obtained through the columns of the paper. He further stated that he did, as stated by Thompson in the letter of March 20, request Thompson to reply and recommend the plaintiff to him as a client. It was established that this was a part of the regular business of the city editor, and was a business of considerable dimensions, there being in many weeks a very large number of letters which required to be dealt with. Horniman stated that he knew the importance of a broker being a member of the Stock Exchange, but he did not know that Thompson was an undischarged bankrupt, but admitted that he could have ascertained his financial position without any difficulty had he made inquiries. It was established that on many previous occasions letters had been answered direct to other correspondents by the brokers advising Horniman, and that it appeared from the columns of the newspaper that correspondents were sometimes answered direct, and that it was the practice of the city editor to recommend firms of brokers. Horniman was suspended from his position as editor in July, 1905, and on

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complaint being made by other correspondents who had employed Hughes & Co. as brokers upon the recommendation of the city editor it was stated that the defendants had done what they could to get back for their correspondents the money owing from Hughes & Co., and that they had taken proceedings on behalf of several would-be investors to recover moneys paid by them to Hughes & Co. It was admitted by the defendants that it was part of the duty of the city editor to answer questions addressed to him, and to recommend brokers. Upon these facts the plaintiff brought the action to recover damages as for breach of contract to exercise due care in giving financial advice to the plaintiff.

The Lord Chief Justice held that the plaintiff was entitled to recover the 1400*l.* sent by him to the broker for investment, and gave judgment for him for that amount. The defendants appealed.

McCall, K.C., and *R. W. Turner* (*Profumo* with them), for the defendants. The liability of the defendants depends upon the existence of a contract between the plaintiff and themselves, for an action would not lie for misrepresentation with regard to the character or solvency of Thompson in the absence of fraud, which is not suggested. Three questions arise for consideration. First, what were the terms of the contract (if any), or what contract ought to be implied under the circumstances? Secondly, what is the alleged breach of that contract? Thirdly, what are the damages in law attributable to the breach, or, in other words, was the breach the proximate and effective cause of the loss which occurred?

The utmost obligation that could be imposed upon the defendants by what took place between themselves and the plaintiff was to take reasonable care to select a properly qualified person as city editor of their newspaper, and to name a good stockbroker, not necessarily a member of the Stock Exchange; they cannot be treated as having undertaken to guarantee the honesty or solvency of the broker recommended. No liability was undertaken by or imposed upon the defendants in respect of naming a stockbroker. The advertisement in the defendants' paper is merely a statement that the city editor will give financial

advice to readers, which means advice as to investments, and it is not suggested that the list of investments supplied by him was other than a good one. Even assuming that the city editor was authorized by the defendants to recommend brokers, the defendants cannot be held to have guaranteed the accuracy of the advice given by their city editor or the character of a person employed by him as his delegate. Further, there was no evidence of want of care or of mala fides on the part of the defendants' city editor in recommending Thompson; he had had dealings with him for six months and had no reason to suspect his honesty or solvency. [They cited on this point *Carlill* v. *Carbolic Smoke Ball Co.* (1); *Hall* v. *Lees.* (2)] Assuming a breach of contract on the part of the defendants, that breach cannot be regarded as the proximate or effective cause of the loss. The cause was the crime of Thompson in misappropriating the money, which cannot be considered as an effect of the defendants' breach of contract in not taking due care in selecting him for recommendation as a stockbroker. It does not necessarily follow from a broker not being a member of the Stock Exchange, or from his being impecunious, that he will misappropriate money entrusted to him. In *Hobbs* v. *London and South Western Ry. Co.* (3) the law as to remoteness of damage was laid down by Cockburn C.J. in these terms: "I think that the nearest approach to anything like a fixed rule is this: that to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of." According to the test there laid down the loss of the plaintiff's money was too remote a consequence of the defendant's breach of contract to be recoverable as damages for that breach.

(1) [1893] 1 Q. B. 256. (2) [1904] 2 K. B. 602.
(3) (1875) L. R. 10 Q. B. 111, at p. 117.

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Further, between the breach of contract and the loss of the plaintiff's money there intervened action by the plaintiff which could not have been in the contemplation of the defendants at the time of the contract. The defendants must have contemplated that the ordinary course of business in dealing with such a broker would be pursued; yet the plaintiff, before any contracts for the purchase of shares had been entered into, and before he had been requested to find any money in respect of any such contracts, sent to Thompson a lump sum of 1300*l.*, apparently for investment in the recommended securities as Thompson might think best. That is not the ordinary course of business on the Stock Exchange, and the efficient cause of the loss was rather the plaintiff's own negligence in entrusting this money to Thompson without any inquiry as to his solvency than any negligence of the defendants in making the recommendation. In any event the defendants' liability is limited to the 800*l.* mentioned in the plaintiff's letter; as regards anything beyond that amount the plaintiff acted on his own responsibility, and not on the advice given him by the city editor.

Spencer Bower, K.C., and *Boydell Houghton*, for the plaintiff. The only point really taken and argued in the Court below was as to the remoteness of damage. It was substantially admitted that there had been a breach of contract for which the defendants were responsible in not taking due care to ascertain whether Thompson was a responsible stockbroker, and a fit person to recommend in answer to the plaintiff's inquiry; and no distinction was there drawn between the 800*l.* and the further sums of money which the plaintiff sent to Thompson. The suggested distinction cannot be validly made. Although 800*l.* was mentioned by the plaintiff in his letter as the sum which he desired to invest, it is impossible to contend that the liability of the defendant is limited to exactly that sum, though had the money sent to Thompson been out of all proportion to the sum of 800*l.*, the case might have been different. Nor is there anything in the circumstances to limit the defendants' liability to consequences arising in the strict course of business with the recommended stockbroker, even assuming (though it is not

admitted) that the sending of the money by the plaintiff to Thompson before receiving advice of a contract having been made on his behalf was a deviation from the ordinary course of business in stockbroking transactions. The real question is whether the plaintiff was induced to part with his money in consequence of the recommendation of Thompson by the city editor in breach of the contract to use due care in recommending a stockbroker. It is not necessary in order that damages may be recoverable in respect of a breach of contract that the defendant should have contemplated exactly the way in which the damages arose: *Smith* v. *London and South Western Ry. Co.* (1); *British Columbia Sawmill Co.* v. *Nettleship.* (2) On the proper construction of the plaintiff's letter the parties were not contemplating a transaction which was to be limited to the 800*l.* there mentioned; the plaintiff was asking for advice as to two independent things, the investment of 800*l.* which he had then in hand ready for investment, and the name of a good stockbroker to whom he might entrust his investments generally. The loss naturally followed from the breach of contract, and was not the result of the plaintiff's own acts.

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R. W. Turner, in reply.

VAUGHAN WILLIAMS L.J. On the whole I think that the judgment of the Lord Chief Justice must be supported in its entirety, although I have had considerable doubt in the course of the argument. In the first place, I think that there was a contract as between the plaintiff and the defendants. The defendants advertised, offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published; such publication might obviously have a tendency to increase the sale of the defendants' paper. I think that this offer, when accepted, resulted in a contract for good consideration.

I also think that the word "stockbroker," as employed between the plaintiff and the defendants, meant a stockbroker

(1) (1870) L. R. 6 C. P. 14. (2) (1868) L. R. 3 C. P. 499.

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who was a member of the Stock Exchange. I think the contract did not amount to a warranty of the character or conduct of the broker named, but I think it did amount to a contract to take reasonable care in the nomination of a broker, and I think there was a clear breach of this contract.

I think that the damages were not nominal. I think that the measure of damages would include all damage which would be sustained by the plaintiff through consequences arising in strict course of business with a stockbroker, a member of the Stock Exchange. I do not think that the damages are limited by the 800*l*. I think that the nomination requested by the plaintiff was of a broker fitted for the performance of the duties of a broker in transactions by way of investments of a moderate type. This, however, is the point on which I have had the most doubt.

The only remaining point is, Does the intervention of the crime which caused the damage make the damages too remote? This, to my mind, depends on whether the words "good stockbroker" import not only skill as a stockbroker, but also trustworthiness and honesty; and, assuming they do, Did the defendants take reasonable care in the selection of the broker? I will answer the second question first. In my opinion they did not, because their city editor consciously recommended an outside broker, though he had accepted an invitation to recommend, according to my construction of the letters, a good stockbroker—a member of the Stock Exchange; and I think the recommendation of a "good stockbroker" included the recommendation of a trustworthy, honest man fit to be entrusted with investments on a small scale. I therefore think that "good stockbroker" imports trustworthiness and honesty as well as skill as a broker. This does not mean that the defendants guaranteed the trustworthiness and honesty of the broker, only that they would take reasonable care in the selection of a broker whom they fairly expected to be trustworthy and honest. Can it be said that an outside broker cannot be recommended as honest and trustworthy? I doubt it. Then can it be said that prima facie no outside broker ought to be recommended till inquiries have been made as to his antecedents? I do not say that, for I think such inquiries should be made of debt-collecting agencies or of the

police. I do say that, if a person is recommending an outside broker, the scope of his inquiries ought to embrace a wider area than if he were recommending a member of the Stock Exchange, for in the latter case he would be recommending, not only a member of a respectable association with good traditions, but one who is subject to stringent and wholesome disciplinary rules. In this case, therefore, the inquiry made by the defendants should have been wider than it in fact was. We must, therefore, see what the defendants through their agent knew, or might have known if adequate inquiry had been made. They admittedly knew that Thompson was an outside broker; they might have known that he was an undischarged bankrupt; they did not, perhaps, know that fact, but they would have found it out had they made reasonable inquiry on the Stock Exchange, or of any dealers in stocks, as to his antecedents. If the broker who is being recommended is not a member of the Stock Exchange, a reasonably careful man in recommending him would not be content with the fact that he had employed him in business for six months, but would carry his investigations further. If that had been done in this case, the defendants' agent would in all probability have discovered matters which would have made him hesitate to recommend him. But whether that was so or not, I cannot doubt that if the plaintiff, being a man of reasonable intelligence and sense, had been informed that the man recommended was an outside broker and an undischarged bankrupt, he would have declined to entrust him with his business. Under the circumstances of the present case I think that the cases as to the intervention of a crime do not apply. The appeal must therefore be dismissed.

SIR GORELL BARNES, PRESIDENT. I agree, and have little to add. On the facts I think that there was a contract for good consideration that the defendants would take reasonable care to name a good stockbroker. The plaintiff was invited to address, and did address, an inquiry as to advice to the defendants' city editor. It has been contended that the city editor had no authority to name a good stockbroker, because it is suggested that his duties were only to give financial advice; but when the

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evidence of Horniman is read it is clear that in the course of his business as city editor he had been in the habit of making inquiries of members of the Stock Exchange until they became tired of answering his questions, as it was only occasionally that it resulted in business being thereby introduced to them; this practice had lasted for a considerable time. In my opinion it is clear that there was a contract. Then was there a breach of it? This point has been gone into fully by Vaughan Williams L.J., and I think it plain on the evidence that the nomination of Thompson as a good broker was not a fulfilment of the terms of the contract.

That brings me to the most difficult point in the case, the question of the measure of damages, as to which it is important to remember that many points have been argued here that were not taken before the Lord Chief Justice. The point taken before him was that the loss was occasioned by the intervening criminal act of the outside broker, and that that circumstance prevented the plaintiff from recovering damages against the defendants. I do not agree with that contention; I think that damages are recoverable by the plaintiff, although the conduct of Thompson may have been such as to bring him within the purview of the criminal law. That point has, however, only been touched upon here, and the defendants have relied upon other points. First, they say that the plaintiff sent his money to Thompson without waiting to receive any contract notes from him, and that it was, therefore, his own negligence which caused the loss. I do not assent to this argument; in my judgment there is nothing to shew that the plaintiff acted unreasonably in trusting the person named by the defendants' city editor, and the fact that he sent the money with the instructions for investment is not against the plaintiff; it does not shew that he so acted as to disentitle him to say that he trusted the broker. Then it is said that the damages, if more than nominal, were at any rate limited by the 800*l.* mentioned in the plaintiff's letter of March 6. I cannot regard the letter as strictly limiting the damages to that sum; I read it as being in the disjunctive, and as inquiring for a good stockbroker who might be employed by the plaintiff for a moderate kind of investment; it was undoubtedly

so treated by the defendants and by Thompson in his letter of March 20, for the city editor had not answered the plaintiff's inquiry in the defendants' paper, but had handed his letter over to Thompson to deal with; and I think the true inference is that it was so handed over for the purpose of Thompson making investments for the plaintiff of the character I have indicated. I cannot say that I am altogether free from doubt on this question of the proper measure of damages, but upon the whole I agree with the view just expressed by the Lord Justice.

BIGHAM J. I agree in the result with the judgments which have been delivered, though I feel very great doubt on one question, the amount of the damages properly recoverable by the plaintiff. I agree that there was a contract for the reasons already given; but it is important to see what that contract exactly was, so as to see also what the breach was. The contract was contained in the plaintiff's letter of March 6, and in the answer to it; the former letter made this request: "I should feel greatly obliged if you will kindly advise me how I can best invest 800*l.* in two or three fairly safe securities, to pay not less than 5 per cent. . . . . Please also name good stockbroker." I am unable to read that letter in the way contended for by the plaintiff's counsel; I read it as a request for advice as to the investment of 800*l.*, and for the name of a good stockbroker to carry out the advice given, and as being limited to the naming of a man who will be responsible to the extent of 800*l.* That was the question; then comes the answer of March 20. The plaintiff's letter had been handed by the city editor to Thompson, an outside broker, who wrote a letter to the plaintiff, in which the plaintiff's request for advice was complied with; the contract was then complete. That letter of March 20 not only completed the contract but also constituted the breach of it, for Thompson did not come within the character of a good stockbroker; he was not a stockbroker within the meaning of the plaintiff's request, nor was he a "good" stockbroker. The real question is, what was the consequence of this breach of contract? Can it be said that the loss of the 1400*l.* was a consequence of the breach? To answer this question it is necessary to look at two or three facts.

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On March 27 the plaintiff sent Thompson 1300*l.*; no purchase of shares had then been made in the plaintiff's behalf, nor had Thompson the right to ask for any money, for he had come under no liability on behalf of the plaintiff; the plaintiff, however, voluntarily sent him the 1300*l.*, which the Lord Chief Justice has found, and rightly found, was instantly lost, that is to say, before the broker was in a position to require payment by the plaintiff of a single penny. I think it is doubtful whether such a loss was consequent on the advice given by the city editor. The next question is whether the damages should not in any event be limited to the sum of 800*l.*, and as to this I feel still more doubtful. In my judgment the request and answer were dealing with transactions which were to be limited to 800*l.*, and it seems very difficult to say that the damages recoverable could exceed that sum. My doubts are, however, confined to the one question of the measure of damages, and I am not prepared to differ from the rest of this Court.

Appeal dismissed.

Solicitors for plaintiff: *Walter Webb & Co.*
Solicitors for defendants: *Harrison & Davies.*

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[IN THE COURT OF APPEAL.]

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CURTICE *v.* LONDON CITY AND MIDLAND BANK, LIMITED.

Banker—Cheque—Countermand by Telegram—Notice—Action for Money had and received—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 75, *sub-s.* 1.

Though a telegram countermanding a cheque may reasonably be acted upon by a banker, at least to the extent of postponing the honouring of the cheque until further inquiry can be made, yet a banker is not bound to accept an unauthenticated telegram as sufficient authority for the serious step of refusing payment.

On October 31, 1906, the plaintiff drew a cheque for 63*l.* on his bankers, the defendants. On the same day, after business hours, he telegraphed to countermand payment of this cheque. The telegram was delivered on the evening of the same day by the Post Office, and, it being after office hours, was placed in the letter-box of the bank. By an oversight on the part of the defendants' servants this telegram was not brought to the notice of their manager until November 2. On November 1 the cheque was presented and paid.

In an action for money had and received:—

Held, that payment of the cheque was not in fact countermanded within the meaning of s. 75 of the Bills of Exchange Act, 1882, although it might well be that it was owing to the negligence of the bank officials that notice of the customer's desire to stop the cheque was not received in time.

Appeal from the decision of a Divisional Court, which raised questions as to the right of a customer to countermand payment of a cheque by telegram.

The matter came before the Divisional Court on appeal from a decision of the Marylebone County Court. The facts as found by the county court judge were as follows:—

The plaintiff, a farmer of Edenbridge, was a customer of the Willesden Green branch of the London City and Midland Bank, the defendants.

On October 31, 1906, he drew a cheque on that branch for 63*l.* in favour of one Jones, as the price of three horses to be delivered by Jones at Charing Cross, at 3.30 p.m. on that date. The horses not being delivered, the plaintiff went to Jones' stables in Harrow Road, and, not getting a satisfactory explanation of the non-delivery of the horses, told Jones that he was

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stopping the cheque, and, on his way back to Charing Cross, at about 5.30 P.M., after business hours, telegraphed to the Willesden Green branch of the defendants' bank to stop payment as follows: "Please stop cheque to James Jones for 63*l*. Curtice." This telegram reached the post office at 27, High Road, Willesden at 6.2 P.M.; it was transcribed by a clerk, and taken to the premises of the defendants' Willesden Green branch by a messenger boy, who, finding the bank closed, placed the telegram in the letter-box in the door of the premises at 6.15 P.M.

Jones meanwhile paid the cheque into the Capital and Counties Bank.

On November 1, by an oversight, the telegram was not taken out of the letter-box when the contents were cleared in the usual course by the defendants' officers or servants at their Willesden Green branch. On that morning the manager of the branch received a letter from the Capital and Counties Bank enclosing the plaintiff's cheque, and requesting the manager of the defendants' Willesden Green branch to inform the Capital and Counties [illegible] by an enclosed prepaid telegraph form what he proposed to do with regard to the cheque. The manager replied by telegram that the cheque would be paid, and it was paid by the defendants' head office. During November 1 the letter-box at the Willesden Green branch was not again examined, all letters being delivered inside the premises during business hours.

On the morning of November 2 the plaintiff's telegram, together with a confirming letter bearing the post mark 10.6 A.M., November 1, was found in the letter-box and handed to the manager of the defendants' Willesden Green branch; he telegraphed to the plaintiff that the cheque had been paid on the day before.

The plaintiff then drew a cheque for 69*l*. 7*s*. 7*d*., the whole of his balance, including the amount of the cheque which he had drawn in favour of Jones. The defendants dishonoured this cheque. The plaintiff then sued for 69*l*. 7*s*. 7*d*. as money had and received to his use. At the trial evidence was adduced to the effect that payment of cheques was frequently countermanded by telegram, and that bankers recognized and acted on that practice.

The county court judge held that the defendants must be taken to have received the plaintiff's telegram on November 1, when the manager of the Willesden Green branch opened the letters directed to that branch, and that there was a good countermand of payment on that date within the meaning of s. 75 of the Bills of Exchange Act, 1882. (1)

Jones had meanwhile delivered the horses, and they had been sold by the plaintiff for 47*l.* 2*s.* Judgment was given for the plaintiff for 21*l.* 7*s.* 7*d.*, being the amount claimed after deducting 5*l.*, which the defendants had admitted to be due, and 43*l.*, the price realized by the sale of the horses after allowing for expenses of the sale.

The Divisional Court (Darling and A. T. Lawrence JJ.) held that there might be a countermand of payment by telegram, but upon the question whether in this particular case there had or had not been a countermand the Court were divided in opinion. A. T. Lawrence J. was of opinion that there was no countermand until the contents of the plaintiff's telegram came to the knowledge of the manager of the defendants' branch, and that the defendants, having paid the cheque according to its tenor and without in fact having notice of any countermand, had done nothing improper, and that an action for money had and received would not lie. Darling J., however, was of opinion that the countermand must be held to have been communicated to the manager on the morning of November 1, when the letters taken from the letter-box were opened, and that the defendants could not be heard to say that the countermand was not effective, as it was due to the default of their own servants that the contents of the telegram had not come to the knowledge of their manager. In these circumstances A. T. Lawrence J., as the junior judge, withdrew his opinion, and the appeal was dismissed.

The bank appealed. The appeal was heard on December 6, 10, 11.

The only questions argued on the appeal which call for any

(1) Bills of Exchange Act, 1882, s. 75: "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—
(1.) Countermand of payment;
(2.) Notice of the customer's death."

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notice in this report were the two questions of law upon which the county court judge and the Divisional Court based their decisions, namely, (1.) whether a cheque could be countermanded by telegram; and (2.) whether in this instance the cheque had in fact been countermanded.

Hugo Young, K.C., and *H. Cassie Holden*, for the appellants. A cheque cannot be countermanded by telegram. A cheque is an order in writing signed by the customer, and can only be revoked by an order of equal authority. The bank have no means of proving from whom the telegram comes. Any one can send a telegram, and if the banker acts on a telegram from a stranger he is liable to his customer; and if he neglects to act on a telegram he is equally liable, if a telegram is a "countermand of payment" within the Bills of Exchange Act, 1882, s. 75, sub-s. 1.

[FLETCHER MOULTON L.J. Is not the real test this?—no revocation can be held binding unless it adequately proves its own authenticity.]

Yes. The bank is not bound to act on a telegram unless it is duly authenticated, e.g., by a special code word, or by a previous notice or agreement to accept a telegram in a particular case. Assuming countermand of payment can be made by telegram, there can be no effective countermand until the countermand is brought to the notice of the bank. The equitable doctrines of constructive notice are not to be introduced into commercial transactions: *Manchester Trust* v. *Furness*. (1)

This is not an action for negligence; it is only an action for money had and received. The cheque was an order to pay, and is good unless and until the authority is revoked; it stands on the same footing as an offer, which is not revoked until the withdrawal of the offer has reached the mind of the person to whom it is addressed: *Byrne* v. *Van Tienhoven* (2); *Stevenson* v. *McLean* (3); *Henthorn* v. *Fraser*. (4) The withdrawal of the mandate to the bank given by the cheque is on the same footing as the withdrawal of an offer.

There is no distinction in principle between the miscarriage of

(1) [1895] 2 Q. B. 539, at p. 545.
(2) (1880) 5 C. P. D. 344, 347.
(3) (1880) 5 Q. B. D. 346.
(4) [1892] 2 Ch. 27.

a withdrawal owing to the fault of the Post Office or to the mistake of one of the bank officials. The bank is not bound to open and know the contents of every letter and telegram the moment the doors are open for business, and unless the withdrawal or countermand has actually affected the mind of the person to whom it was addressed it is not an effective countermand.

English Harrison, K.C., and *D. Hogg*, for the respondent. In commercial transactions it is clear that regard must in these days be paid to a telegram. The effect of a warrant not to remove a ship can be communicated by telegram: *The Seraglio.* (1)

[FLETCHER MOULTON L.J. In that case there was no doubt that the telegram was genuine.

FARWELL L.J. It has long been the practice of the Chancery Division to send notice of an injunction by telegram, and the party so warned disobeys it at his peril.]

The evidence in the county court was that large numbers of cheques are stopped by telegram.

[FLETCHER MOULTON L.J. A telegram is merely the official copy of a document, in itself unauthenticated.]

Considering the evidence and the common knowledge of the use that is made of the telegraph in these days, it is contended that a cheque can be stopped by telegram. It may be admitted that the equitable doctrine of constructive notice does not apply to business transactions, and the question therefore is whether, under the circumstances, there has been here a sufficient countermand within s. 75, sub-s. 1. The respondent contends that there has been a sufficient countermand. The telegram was, or ought to have been, in the hands of the officials of the bank at its opening on November 1, so that the plaintiff had done all that was necessary. The bank was bound to use the ordinary diligence which their calling required: *Marsh* v. *Keating* (2); and had ordinary care been taken the telegram would have been discovered in time to stop payment of this cheque. Assuming that a countermand to be effective must come to the knowledge of the bank manager, the appellants cannot be heard to say that this condition has not been fulfilled, when it was owing

(1) (1885) 10 P. D. 120.
(2) (1834) 1 Bing. N. C. 198, at p. 220.

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to the negligence of their own officials that this telegram was not discovered in time.

Upon the cheque being stopped it is just as if it had never been given: *Cohen* v. *Hale* (1); and the money remains with the bank as money had and received from the plaintiff. The telegram, having been delivered at the bank after office hours on October 31, operated as a good notice on the opening of the bank on November 1, and the rights of the parties do not depend upon the time when the telegram was actually opened: *Calisher* v. *Forbes*. (2)

COZENS-HARDY M.R. The question raised by this appeal is whether a cheque drawn by the plaintiff upon his bankers was countermanded within the meaning of s. 75, sub-s. 1, of the Bills of Exchange Act, 1882, by means of a telegram sent by the plaintiff to his bankers. [Having stated the facts, the Master of the Rolls continued:—] Under those circumstances the learned county court judge has found that the cheque was countermanded, and gave judgment for the plaintiff. In the Divisional Court Darling J. agreed with the learned county court judge, and A. T. Lawrence J. took the opposite view.

Countermand is really a matter of fact. It means much more than a change of purpose on the part of the customer. It means, in addition, the notification of that change of purpose to the bank. There is no such thing as a constructive countermand in a commercial transaction of this kind.

In my opinion, on the admitted facts of this case, the cheque was not countermanded, although it may well be that it was due to the negligence of the bank that they did not receive notice of the customer's desire to stop the cheque. For such negligence the bank might be liable, but the measure of damage would be by no means the same as in an action for money had and received. I agree with the judgment of A. T. Lawrence J. on this point, and that is sufficient to dispose of the appeal. But as we have had an argument addressed to us as to the effect upon the duty of a bank of the mere receipt of a telegram, I wish to add a few words on that. A telegram may, reasonably and in the

(1) (1878) 3 Q. B. D. 371. (2) (1871) L. R. 7 Ch. 109.

ordinary course of business, be acted upon by the bank, at least to the extent of postponing the honouring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque.

The result is that the appeal is allowed, with costs here and below.

FLETCHER MOULTON L.J. I am of the same opinion, and I fully agree with everything that the Master of the Rolls has said. [After referring to some of the facts as to the delivery of the horses and the subsequent conduct of the plaintiff, his Lordship continued:—]

The two points upon which the learned county court judge based his decision in this action, treating it as an action for money had and received, are these. First, he has laid down as a principle of law that a banker is bound to act on a telegram stopping a cheque, and if he does not so act he does it at his peril. Now, for the reason that the Master of the Rolls has stated very clearly, and very tersely, I am of opinion that that proposition cannot be supported. A banker (although so far as his financial relations to his customer are concerned he stands in the position of debtor and creditor) is for such a purpose as this only a particular type of agent; he is in the possession of money of the customer, and his duty is to obey the directions of the customer as to paying that money out. If an order is given to him he has the ordinary rights of any agent with regard to the mode in which that order shall be given to him. I use the word "mode" in its widest sense. It has long been held that an order must be unambiguous. If a master chooses to give an order to his servant that bears two meanings, he cannot find fault with his servant for having taken the meaning which it was not in fact intended to bear; and that applies to a banker when receiving orders as much as to agents generally.

Now that principle which applies to the duty of conveying the mandate in a form in which the meaning is unambiguous applies, in my opinion, mutatis mutandis to the question of its

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authenticity. If the mandate is sent in a form in which a servant, acting reasonably, has no security that the mandate comes from his employer, the employer cannot grumble that he did not act upon it. Authenticity and meaning appear to me, in the general law of agency, to stand on the same footing, subject, of course, to the broad difference of circumstances which are due to the difference of nature of the two. In my opinion a telegram which is only an official but unauthenticated copy of a document, in itself unauthenticated, cannot be said to be necessarily and as a matter of law a mandate communicated in such a way that its provenance is unambiguous. On the other hand, I think that any man of business, or a jury, consulted upon the matter would say that in a vast number of cases the internal evidence of the telegram itself, or the circumstances under which it was sent, or the relations of business between the master and the servant, would make it the duty of the servant to act on particular telegrams; and, therefore, I do not want any word that I utter to imply that any agent, whether he be a banker or otherwise, may ignore communications by telegram. At the same time I desire to say most emphatically that I cannot hold it as part of the doctrine of agency that a principal who has sent this agent a telegram which does not, when looked at reasonably, vindicate its own authenticity, has a right to say that the agent who has on that account declined to act upon it has done so at his peril. It must be a question in each case as to whether the agent has behaved reasonably in acting or not acting upon that telegram. So much for the first point.

With regard to the second point, as to the doctrine that there may be in law constructive notice of the meaning of a countermand which has not reached the mind of the servant, I agree entirely with what the Master of the Rolls has said. If it is by the negligence of the servant that the notice has not reached him, he is responsible for that negligence and for the damages that naturally follow therefrom; but that he should be, as a matter of law, disentitled to prove the fact that he did not know of something seems to me to be a doctrine which, in mercantile matters, is one which the Court

will give no countenance to. For those reasons I think that the appeal should be allowed.

FARWELL L.J. No one supposes that a banker or any other business man can safely disregard a telegram by neglecting to clear out his letter-box, which may contain letters and telegrams. If he does so, he does so at his peril, inasmuch as he may suffer loss himself, or he may expose himself to an action for negligence. But the plaintiff's case is not based on negligence: his case is that the mere delivery of a telegram by the Post Office authorities to a bank, although that telegram has by an oversight never been opened, and has, therefore, never come to the attention of the banker, operates as a countermand of payment within s. 75, sub-s. 1, of the Bills of Exchange Act. In my opinion that cannot be so, and I entirely agree with the Master of the Rolls as to the impossibility of applying the doctrine of constructive notice to business transactions like the present. It is a question of fact whether the payment was in fact countermanded or not. The relation of banker and customer is one of debtor and creditor, with a superadded contract by which the creditor is entitled to withdraw his balance from time to time in such amounts as he thinks fit. That is a question of contract.

There is no contract that the banker will do more than honour the cheque. On that is superadded the statute, which shews that the duty and authority of a banker to pay a cheque drawn on him by his customer may be countermanded on notice being given to him. In my opinion that must be actual notice brought to his attention. On the evidence here it is clear that the banker is simply put on inquiry by the receipt of a telegram, and his duty is not to pay at once, but to make inquiries; and, if the mere receipt of a letter or telegram were sufficient countermand, the position of a banker in large business would be most difficult. Supposing a midday post comes in with so many letters that it takes a quarter of an hour (not an unreasonable time) to open them—it is during bank hours, and just as the post comes in or within five minutes afterwards a number of cheques are presented, is it to be said that the banker must

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thereupon refuse to cash any of those cheques until he has opened all his letters? On the general question of stopping by telegram I am disposed to think that it would depend a great deal on the custom of the bankers, and the agreement, if any, between the customers and their bankers, that business should be conducted by telegram, and this would depend on the evidence in each case. I therefore agree with the result which has been arrived at.

Appeal allowed.

Solicitors: *Weekes & Co.; Cooper & Blake.*

W. C. D.

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[IN THE COURT OF APPEAL.]

EMANUEL AND OTHERS *v.* SYMON.

Foreign Judgment—Jurisdiction of Foreign Court—Ownership of Property Abroad—Contract of Partnership Abroad—Partner resident in England—Agreement to submit to Foreign Jurisdiction.

Neither the fact of possessing property situate in a foreign country nor the fact of entering into a contract of partnership in that country to deal with that property is sufficient to give the Courts of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign Court.

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into a partnership for the working of a gold mine situate in the Colony and owned by the partnership. The defendant ceased to carry on business in Western Australia, and in 1899 he left the Colony permanently and came to live in England. In 1901 the plaintiffs, being partners other than the defendant, brought an action in the Supreme Court of Western Australia claiming a decree for dissolution of the partnership, sale of the mine, and the taking of the partnership accounts. The writ was served on the defendant in England, but he entered no appearance, and took no step to defend the action. The Court decreed a dissolution of the partnership and the sale of the mine, and on taking the accounts found a sum to be due from the partnership. The plaintiffs paid the sum, and brought an action in England to recover the share which they alleged to be due from the defendant:—

Held, that the defendant, not being domiciled in Western Australia, nor resident there at the date of the action in the Supreme Court of that

Colony, and not having appeared to the process or expressly agreed to submit to the jurisdiction of that Court, was not bound by its finding or decree; and that the action in this country, which was based on that finding and decree, could not be maintained.

Becquet v. *MacCarthy*, (1831) 2 B. & Ad. 951, commented on.

Sirdar Gurdyal Singh v. *Rajah of Faridkote*, [1894] A. C. 670, followed.

Judgment of Channell J., [1907] 1 K. B. 235, reversed.

APPEAL from the judgment of Channell J. (1)

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into partnership with five other persons, whose interests were now represented by the plaintiffs, for the purpose of working and developing a gold mine situate in that Colony and owned by the partnership. The defendant subsequently gave up his business in Western Australia, and in 1899 he left the Colony permanently and came to live in England. In 1899 two of the partners assigned their shares to a third partner, who died in 1901.

In November, 1901, a writ was issued by the plaintiffs, who were the two continuing partners who had not assigned their shares and the executors of the deceased partner, against the defendant in the Supreme Court of Western Australia, claiming a dissolution of partnership, a sale of the mine, accounts and inquiries, and other relief as in an ordinary partnership action. On November 13, 1901, that writ was served on the defendant in England, but he did not enter an appearance, or take any other step to defend the action. He was, however, kept informed from time to time of the proceedings in the action.

On July 25, 1902, the Supreme Court of Western Australia, in default of appearance by the defendant, pronounced a decree for the dissolution of the partnership as from that date, and ordered the mine to be sold and the usual accounts to be taken by the taxing officer. The sale was carried out and the accounts were taken, and the taxing officer issued his certificate shewing liabilities of the partnership amounting to a sum of 7687*l.* 9*s.* 9*d.* In May, 1903, the final order of the Court was pronounced, under which the plaintiffs paid the sum found to be due from the partnership. They subsequently issued the writ in this action

(1) [1907] 1 K. B. 235.

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to recover from the defendant the sum of 1281*l.* 4*s.* 11*d.* as his share of the sum of 7687*l.* 9*s.* 9*d.* paid by them as aforesaid.

The defendant denied that he was bound by the finding or order of the Colonial Court, on the ground that he was a British subject resident and domiciled in England; that neither at the commencement nor during the continuance of the action was he resident or domiciled in Western Australia, or subject to the jurisdiction of the Courts of that Colony; and that he had neither appeared to the process nor agreed to submit himself to the jurisdiction of those Courts.

Channell J. held that by entering into a partnership in Western Australia relating to real estate in that Colony the defendant had impliedly agreed to submit to the jurisdiction of the Colonial Court as to disputes arising during the continuance and on the termination of the partnership, and was therefore bound by the finding of that Court. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

McCall, K.C. (*Groser* with him), for the defendant. The judgment of Channell J. rests upon this foundation, that the defendant, by joining this partnership for working a mine in Western Australia, must be taken to have contracted that all partnership disputes should be determined by the Courts of that Colony. But this ground is insufficient to support the judgment; because, firstly, the possession of property in a foreign country does not give the Courts of that country a general jurisdiction in personam over the possessor: *Schibsby* v. *Westenholz.* (1) The case of *Becquet* v. *MacCarthy* (2) is relied on by the plaintiffs as an authority in support of the foreign jurisdiction, but the weight of that decision upon this point has been doubted by Fry J. in *Rousillon* v. *Rousillon* (3); and in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (4) Lord Selborne, delivering the opinion of the Privy Council, expressed the view that the decision could be supported only on the ground that the defendant at the time of action brought held a public office and must be taken to be

(1) (1870) L. R. 6 Q. B. 155.
(2) 2 B. & Ad. 951.
(3) (1880) 14 Ch. D. 351.
(4) [1894] A. C. 670.

constructively present in the foreign country. The decision in *Becquet* v. *MacCarthy* (1) has also been questioned in Dicey's Conflict of Laws, p. 373, as an authority in favour of the plaintiffs.

Secondly, the mere fact that a contract is made in a foreign country, or to be performed in a foreign country, is not sufficient to give the Courts of the foreign country jurisdiction over the parties to the contract: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (2); and it matters not for this purpose whether the contract is one of partnership or of any other description.

Holman Gregory, for the plaintiffs. The parties to a contract may agree that the Courts of a foreign country shall have jurisdiction to decide questions arising between them, and such an agreement confers jurisdiction upon the foreign Courts: *Copin* v. *Adamson*. (3) That jurisdiction is not taken from the foreign Courts by the mere fact that one of the parties has ceased to reside in the country: *Schibsby* v. *Westenholz* (4), per Blackburn J.; and see *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (5) The question in this case is whether the parties to this contract of partnership have agreed that the Courts of Western Australia shall have jurisdiction. When persons agree to become partners in a business or transaction which can only be carried on or effected in a foreign country, there is necessarily implied an agreement to submit to the jurisdiction of the foreign Courts.

[KENNEDY L.J. Such an agreement, in order to be binding, must be express. It is not to be implied: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (6)]

Counsel for the defendant were not called upon in reply.

LORD ALVERSTONE C.J. I am unable to agree with the judgment of Channell J. I should have felt inclined, out of respect for that learned judge, to take time to consider my judgment, if I had thought that further consideration would have enabled me to come to a conclusion clearer than that at which I have arrived; but this is a point which has been before the

(1) 2 B. & Ad. 951.
(2) [1894] A. C. 670.
(3) (1874) L. R. 9 Ex. 345.
(4) L. R. 6 Q. B. 155, at p. 161.
(5) [1894] A. C. 670, at p. 684.
(6) Ibid. at p. 686.

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Courts on many former occasions, and I do not think that anything is to be gained by further perusal of the authorities.

The judgment of Channell J. is based upon this sentence: "The defendant," said the learned judge (1), "by joining this partnership for the working of the mine in Western Australia, must, I think, be taken to have contracted that all partnership disputes, if any, should be determined by the Courts of that country, and thereby subjected himself to the jurisdiction of those Courts, just as in *Copin* v. *Adamson* (2) it was held that a man who took shares in a French company and expressly agreed that disputes as to shares should be settled in the manner provided by the company's articles, that is, in the Courts of France, so subjected himself." If that position is sound, the judgment must be affirmed; but in my view it cannot be maintained in view of considered opinions of such weight that, though perhaps not technically binding upon us, they cannot be disregarded.

The sentence I have cited really contains two grounds for the conclusion that the defendant had submitted himself to the jurisdiction of the foreign Court: first, that he was the owner of real property in the foreign country; and, secondly, that for the purpose of managing and dealing with that property he had entered into a contract of partnership in the foreign country. Now it cannot be disputed that the ownership of real estate in a foreign country does give the Courts of that country jurisdiction to deal with the property itself. That was recognized in *Douglas* v. *Forrest* (3) and in *London and North Western Ry. Co.* v. *Lindsay*. (4) It has been suggested that it does more, and the case of *Becquet* v. *MacCarthy* (5) has been cited as an authority for the wider proposition, that the possession of real property in a foreign country may give the Courts of that country jurisdiction in personam over the possessor, at any rate in regard to obligations connected with that property: see Dicey on the Conflict of Laws, p. 54; but it seems better to support the decision in that case upon the ground that the defendant held a public office in the country in which he was sued. I would refer to *Don* v. *Lippmann* (6), per

(1) [1907] 1 K. B. 235, at p. 240.
(2) L. R. 9 Ex. 345; 1 Ex. D. 17.
(3) (1828) 4 Bing. 686.
(4) (1858) 3 Macq. 99.
(5) 2 B. & Ad. 951.
(6) (1837) 5 Cl. & F. 1, at p. 21.

Lord Brougham, and to a passage in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1), in which Lord Selborne disposes of the contention that *Becquet* v. *MacCarthy* (2) can be relied on as an authority that the mere possession of property in a foreign country is enough to give a general jurisdiction in personam to the Courts of the foreign country. It seems better to regard *Becquet* v. *MacCarthy* (2) as an authority thus far only, that a person, although a foreigner, holding a public office in the country in which he is sued, may be deemed to be constructively present in that country, but not to regard that case as any authority that the mere possession of property locally situate in a foreign country and protected by its laws affords sufficient ground for holding a person bound by the judgment of the tribunals of that country.

The second ground of the decision under appeal, and that on which counsel for the plaintiffs mainly relied, was that the fact of entering into a contract of partnership in a foreign country involves an irrevocable agreement that all matters and disputes arising in connection with the partnership shall be submitted to, and therefore lie within, the jurisdiction of the Courts of that country. In my opinion this question also has been concluded by authority of great weight which this Court cannot disregard.

In *Schibsby* v. *Westenholz* (3) Blackburn J. said: "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." That passage was commented upon by Lord Selborne in these words (1): "Beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of any jurisdiction over them in respect of such

(1) [1894] A. C. 670, at p. 685. (2) 2 B. & Ad. 951.
(3) L. R. 6 Q. B. 155, at p. 161.

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a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad." His Lordship then proceeds to express the opinion that that would not be a legitimate consequence; and in my view it is too broad a proposition to lay down that, given a contract of partnership in a foreign country, it follows that all matters arising between the partners have been submitted to the jurisdiction of the Courts of that country, although one of the partners is not a subject of, nor domiciled nor resident in, that country. Indirectly the case of *Copin* v. *Adamson* (1) is an authority to the contrary. The judgment in that case went in favour of the plaintiff because the defendant had expressly agreed to submit to the jurisdiction of the foreign Court. And in the Court of Appeal the judgment of Lord Cairns proceeded on that footing, and he refrained from deciding the question whether the mere fact of becoming a shareholder in a French company conferred jurisdiction upon the Courts of France. But in the Court of Exchequer the plaintiff had pleaded that by becoming a shareholder in a foreign company the defendant had submitted himself to the jurisdiction of the foreign country. Upon that point Amphlett B. said (2): "I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests?" I do not cite this passage as an express authority upon the point in this case, but as shewing that judges of high authority were not prepared to adopt the view that the mere

(1) L. R. 9 Ex. 345; 1 Ex. D. 17. (2) L. R. 9 Ex. 345, at p. 355.

ownership of property, or the mere entering into a contract to take shares in a foreign company, was enough to make a person amenable for all purposes to the jurisdiction of the foreign country. When *Copin* v. *Adamson* (1) was heard on appeal in the Court of Appeal (2) Lord Cairns decided the case upon the first point, namely, that there had been an express contract to submit to the foreign jurisdiction, and declined to decide the second point; and I think the conclusion from these authorities is that, to make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction of that country, there must be something more than a mere contract made or the mere possession of property in the foreign country. In my opinion, therefore, this appeal must be allowed.

BUCKLEY L.J. I am of the same opinion. In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case. In *Rousillon* v. *Rousillon* (3) Fry J., after enumerating the five cases above mentioned, added these words, "and, possibly, if *Becquet* v. *MacCarthy* (4) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." The principle upon which this Court proceeds in enforcing foreign judgments is stated by Blackburn J. in *Schibsby* v. *Westenholz* (5) in these words: "We think that for the reasons there"—i.e., in the case of *Godard* v. *Gray* (6)—"given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by

(1) L. R. 9 Ex. 345; 1 Ex. D. 17.
(2) 1 Ex. D. 17.
(3) 14 Ch. D. 351, at p. 371.
(4) 2 B. & Ad. 951.
(5) L. R. 6 Q. B. 155, at p 159.
(6) (1870) L. R. 6 Q. B. 139.

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Parke B. in *Russell* v. *Smyth* (1), and again repeated by him in *Williams* v. *Jones* (2), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts of this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." In other words, the Courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognized in this country and leads to judgment here also. Referring to *Becquet* v. *MacCarthy* (3), Mr. Dicey in his work on the Conflict of Laws has, at p. 373, the following comment: "But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction?" That comment is justified, and the doubt there expressed recognized, if indeed a negative answer to the question was not given in a substantive form, and without any doubt, by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (4) *Becquet* v. *MacCarthy* (3) has been the subject of adverse comment—first, in *Schibsby* v. *Westenholz* (5), where Blackburn J. said: "Whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest* (6), we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground"; secondly, by Fry J. in *Rousillon* v. *Rousillon* (7), where that learned judge said, "and possibly, if *Becquet* v. *MacCarthy* (3) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction"; and, thirdly, by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (8), where he said: "Of *Becquet* v. *MacCarthy* (3) it was said by great authority in *Don*

(1) (1842) 9 M. & W. 810, at p. 819.
(2) (1845) 13 M. & W. 628, at p. 633.
(3) 2 B. & Ad. 951.
(4) [1894] A. C. 670.
(5) L. R. 6 Q. B. 155, at p. 163.
(6) 4 Bing. 686, at p. 703.
(7) 14 Ch. D. 351, at p. 371.
(8) [1894] A. C. 670, at p. 685.

v. *Lippmann* (1), that it 'had been supposed to go to the verge of the law'; and it was explained (as their Lordships think correctly) on the ground that 'the defendant held a public office in the very Colony in which he was originally sued.' He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the Colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a Colonial Government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Fry L.J. in *Rousillon* v. *Rousillon* (2) took that view." Lord Selborne then goes on to discuss the question whether it makes any difference that the defendant, at the time when the obligation was contracted, was resident in the foreign country, but left it before the suit was instituted; and, after observing that Blackburn J., delivering the opinion of the Court of Queen's Bench in *Schibsby* v. *Westenholz* (3), inclined to the view that the laws of the foreign country would bind the defendant, though he declined to decide that point without further argument, Lord Selborne said (4): "Their Lordships do not doubt that, if he"—i.e., Blackburn J.—"had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied." Having regard to these passages, *Becquet* v. *MacCarthy* (5), if and in so far as it decides that a person, who merely possesses property or enters into a contract in a foreign country, binds himself to submit to the jurisdiction of the foreign country,

(1) 5 Cl. & F. 1.
(2) 14 Ch. D. 351.
(3) L. R. 6 Q. B. 155.
(4) [1894] A. C. 670, at p. 686.
(5) 2 B. & Ad. 951.

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can, I think, no longer be sustained; and the proposition on which Channell J. based his judgment, namely, that inasmuch as the defendant had become a party to a contract of partnership in Western Australia he must be taken to have bound himself to submit to the jurisdiction of the Courts of that Colony, is not sound. This appeal must therefore be allowed.

KENNEDY L.J. I am of the same opinion.

In *Rousillon* v. *Rousillon* (1) Fry J. laid down what may be called a table of the classes of cases in which the Courts of this country consider a defendant bound by a decision of a foreign Court. Concerning the first four classes mentioned, no subsequent judgment has expressed any disagreement or doubt. But the fifth and sixth—the last at any rate (and this is only stated as "possibly" correct) in the light of later decisions, cannot be accepted absolutely. Of those two classes the first is, "Where he"—i.e., the defendant—"has contracted to submit himself to the forum in which the judgment was obtained." The other is stated in these words, "and, possibly, if *Becquet* v. *MacCarthy* (2) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." Now *Becquet* v. *MacCarthy* (2) has practically been treated as an authority to this extent, that where the defendant, at the time of the action in which judgment was given against him in the foreign country, was the holder of a public office in that country, and where the cause of action arose out of or in connection with the tenure of the office, he is bound by the judgment; but the doctrine suggested as possibly right by the learned judge, namely, that the defendant may be bound where he is the owner of real estate within the foreign jurisdiction, is a doctrine which has been disapproved by the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (3) Now if that doctrine be disposed of, the subsidiary ground on which Channell J. has based his judgment in the present case gives way. That subsidiary ground was the ownership of real property in

(1) 14 Ch. D. 351, at p. 371. (2) 2 B. & Ad. 951.
(3) [1894] A. C. 670.

the Colony of Western Australia. If the possession of real property cannot be relied on in support of his judgment, the only remaining point is whether by the mere fact of entering into a contract in a foreign country a person binds himself to submit to the jurisdiction of the Courts of that country, even though at the time when the action is commenced he has ceased to reside in the foreign country. That point also has been disposed of by the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (1) The doctrine was propounded in the passage relied upon by Mr. Holman Gregory for the plaintiffs, from the judgment of Sir Meredyth Plowden in the Chief Court of the Punjaub (2), and is as follows: "On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant." As the Privy Council point out, if this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. It would follow from the proposed doctrine that a British subject domiciled here, who, while temporarily in a foreign country, made a contract for a sale of goods there, must be taken to be bound by the decision of the Courts of that country in an action on the contract given merely ex parte, though he entered no appearance, and took no part in the proceedings, and had not resided in the country since the day on which he made the contract. That question is dealt with in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3), not only with reference to the opinion of the Chief Court of the Punjaub, but also with reference to a view expressed by Blackburn J. in *Schibsby* v. *Westenholz* (4); and the decision of the Privy Council is clear that there is no implied obligation on a foreigner to the country of that forum to accept the forum loci contractus, as having, by reason of the contract, acquired a conventional jurisdiction over him in a suit founded upon that contract for all

(1) [1894] A. C. 670.
(2) Ibid. at p. 684.
(3) Ibid. at pp. 685, 686.
(4) L. R. 6 Q. B. 155, at p. 161.

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future time, wherever the foreigner may be domiciled or resident at the time of the institution of the suit. Such an obligation may exist by express agreement, as in the case of *Copin* v. *Adamson* (1), and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals; but such an obligation, as is pointed out in the decision of the Privy Council (2), is not to be implied from the mere fact of entering into a contract in a foreign country. It is contended that there may be some difference between a contract to be fulfilled for the immediate benefit of the promisee, e.g., a contract for the sale of goods, and the contract contained in articles of partnership; but I can see no true line of distinction between the two cases. Something has to be performed by the promisor in either case. The only question is whether there is any convention which binds the promisor to submit to the foreign jurisdiction. If no such convention exists in the case of a contract for the sale of goods, none such exists in the case of a contract of partnership. Nor can I see any difference in this respect between a partnership and a company. In *Copin* v. *Adamson* (1) there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts, and it seems to me that what applies to a company applies equally to a partnership.

I therefore agree that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Wanser, Bower & Stammers.*
Solicitors for respondents: *Trinder, Capron & Co.*

(1) L. R. 9 Ex. 345; 1 Ex. D. 17. (2) [1894] A. C. 670, at p. 686.

W. H. G.

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Dec. 11, 12.

Rates—General District Rate—Occupation of Land—"Land covered with Water"—Pontoons floating over excavated Ground—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

The appellants, a dock company, were the owners and occupiers of certain hereditaments on the north-west bank of the river Tyne. Part of the hereditaments consisted of a yard with buildings used for building and repairing ships. The appellants excavated a certain space of ground alongside of their yard which before the excavation was dry land belonging to them. After the excavation the water of the Tyne flowed at all states of the tide over the excavated ground. The appellants constructed two pontoons which were used by them in their business of repairing ships. The most important part of the appellants' business was done by means of the pontoons. The pontoons floated over the excavated ground, each pontoon being kept in position by iron arms or booms working up and down on hinges as the tide rose or fell. The arms were arranged in pairs one above another, and were attached at one end to the pontoon and at the other to piles driven into the excavated ground; but the pontoons could be detached from the piles, and might have been kept in position by means of chains instead of the iron arms:—

Held—(1.) that the appellants were in occupation of the excavated land so as to be rateable in respect of it, inasmuch as they were in occupation of the land before and during the excavation, and afterwards the most important part of their business was done over the site; (2.) that the excavated ground over which the pontoons floated was "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Although as a general rule a point cannot be taken on the argument of a special case stated by a Court of quarter sessions which was not taken in that Court, the special case may be so stated as to compel the Divisional Court to decide it.

Case stated by a court of quarter sessions for the county of Northumberland.

In a general district rate made by the respondents, the Tynemouth Corporation, on April 23, 1906, the appellants, Smith's Dock Company, Limited, were rated at the sum of 4700*l.* as the rateable value of certain hereditaments belonging to and occupied by them on the north-west bank of the river Tyne, and described in the rate as "Pontoons, dock, land, buildings, &c." The sum of

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4700*l.* was the full net annual value of the hereditaments ascertained by the valuation list for the purposes of poor rate in force at the date of the general district rate.

The appellants appealed to quarter sessions against the rate, on the ground that they were therein rated upon the full net annual value of the whole of the hereditaments, and contended that they should have been rated in respect of part of the hereditaments in the proportion of one-fourth part only of such net annual value under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, on the ground that the part of the hereditaments consisted of "land covered with water" within the meaning of that section. For the purpose of the appeal the appellants admitted that the sum of 4700*l.* was correctly entered in the list and rate as the full net annual value of the whole of the hereditaments.

The hereditaments included a ship-building yard, with buildings containing machinery for building and repairing ships.

The space occupied by the pontoons was at one time dry land, the property of the appellants or their predecessors in title. The pontoons (two in number) were constructed in order to take ships which were too big to be admitted into the appellants' dry dock. The ground under the pontoons, and a certain space behind them alongside the appellants' ship-building yard, was excavated by the appellants, and the water of the river Tyne now flowed at all states of the tide over the ground so excavated.

Each of the pontoons was constructed of iron plates, like those used in an iron-built ship, and was used for repairing ships in the following manner:—The ship which required to be painted or repaired was brought over the water of the Tyne alongside of the pontoon, which was then submerged by letting water into the chambers of which it was constructed. The ship was then floated over the submerged pontoon, and the water in the pontoon was pumped out, and the pontoon by its own buoyancy rose and lifted the ship high and dry out of the water. In some cases where the ship to be repaired was longer than the pontoon on which it was placed, part of the decking had been removed at each end of the pontoon so as to make room for such ship.

Each of the pontoons was kept in position by iron arms or booms, working up and down on hinges as the tide rose or fell.

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The arms were arranged in pairs one above another; they were attached at one end to the pontoon and at the other to piles driven into the ground which was excavated and dredged out as above described. Wooden decking, which could be removed as occasion required, was fixed upon the piles, thus forming a false jetty.

Notwithstanding the connection by means of the iron arms, the pontoons could be detached from the piles to which they were attached, and they had in fact been detached and taken away from the places where they ordinarily floated, whenever it had been necessary to paint or repair the pontoons or to dredge the mud which collected underneath them. The pontoons could (if it were thought convenient) be kept in position by means of chains instead of the iron arms, and in other cases similar pontoons were in fact so kept in position by means of chains.

One of the pontoons was pumped out by means of a steam engine, to which steam was conveyed through a pipe attached to one of the iron arms. The other pontoon was pumped out by an engine driven by electricity conveyed by a cable attached to one of the iron arms. Both the engines could have been worked by means of power generated on board the pontoons, without any connection with boilers or plant on land for generating steam or electricity. On some of the iron arms a gangway was fixed to enable workmen to pass from the land to the pontoons, and vice versa.

The pontoons were always afloat. The tide had a rise and fall of about fifteen feet at ordinary spring tides, and at low water at ordinary spring tides there was a depth of about 3 ft. 6 in. of water underneath the pontoons. There was a margin of water a few feet wide round the pontoons exposed to the upper air and sky.

When it was necessary to take any machinery out of a ship resting on one of the pontoons for the purpose of repairing such machinery it was taken into one of the buildings containing machinery for building and repairing ships. About 80 per cent. of the business done by the appellants in the hereditaments was done on or in connection with ships which were carried on the pontoons in the manner hereinbefore described.

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The appellants contended that the land which had been excavated, and over which the pontoons floated, was "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875 (1), and that they should have been assessed in respect thereof in the proportion of one-fourth only of the net annual value in the manner provided by the section.

The respondents contended that no part of the hereditaments ought to be rated as "land covered with water" under the section; that the pontoons were in fact, and ought to be, rated as part of the premises forming the shipbuilding or repairing yard, or as machinery or appliances attached and ancillary to the use of the yard and enhancing its value as a rateable hereditament.

The respondents admitted that they had rated the pontoons in accordance with the last-mentioned contention. If, contrary to the respondents' contention, the pontoons ought to have been rated as enhancing the value of that part of the land which had been excavated, the respondents admitted that the assessment could not be supported, and that the part of the hereditaments ought to be rated at one-fourth part only of the net annual value thereof.

It was agreed between the appellants and respondents that if part of the hereditaments ought to be rated at one-fourth part only of the net annual value, the net annual value of that part was 3300*l.*, and that the rate should be upon one-fourth part thereof; and that the rate should be upon the full net annual value of 1400*l.*, being the residue of the sum of 4700*l.*, which is the net annual value of the whole of the hereditaments.

The Court of quarter sessions decided that the contention of the respondents was right in law, and dismissed the appeal with costs.

If the Court should be of opinion that the decision of the Court of quarter sessions was correct, the decision was to stand. If

(1) Public Health Act, 1875, s. 211, sub-s. 1 (*b*): "The owner of any . . . . land covered with water . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

the Court should be of opinion that the contention of the appellants was correct, then the rate was to be amended in accordance with the agreement between the appellants and respondents above referred to.

Walter Ryde, for the appellants. The land which the appellants excavated and over which the pontoons float is land covered with water within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The pontoons do not add to the value of the adjacent land. Suppose the boundary of the parish coincided with the line up to which the ground was excavated by the appellants. Before the excavation the land was valuable. If the contention on behalf of the respondents is right, the effect of the excavation would be to take away all the value of the land from the parish in which it was situated before the excavation and to transfer it to the adjoining parish. That cannot be the true effect of the excavation. The pontoons are not analogous to the balcony of a house which may increase the rental of the house, for a balcony is quite independent of what is beneath it; but the water is absolutely necessary for the pontoons. The appellants are in occupation of the land, and it is covered with water. The appellants occupy the land on which the pontoons float. The reason the exemption is granted under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, is because the hereditament exempted has less benefit from the rate. It is clear that the exemption extends to artificial structures: *Reg.* v. *Newport Dock Co.* (1) The pontoons are not themselves rateable, but they enhance the value of the land beneath them which is land covered with water, and the land is occupied by the appellants: *Reg.* v. *Morrison* (2); *Forrest* v. *Greenwich Overseers* (3); *Cory* v. *Bristow*. (4) The decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Kingston-upon-Hull Union* (5) shews that the mere possession and keeping in position of a floating vessel does not make the owner rateable for the moorings of the vessel. In *Tyne Pontoons Co.* v. *Tynemouth*

(1) (1862) 31 L. J. (M.C.) 266.
(2) (1852) 1 E. & B. 150.
(3) (1858) 8 E. & B. 890.
(4) (1877) 2 App. Cas. 262.
(5) (1896) 75 L. T. 127.

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Union (1) the company were held to be rateable as occupying the soil of the creek by means of the pontoons moored there.

Macmorran, K.C., and *E. Shortt*, for the respondents. The exemption conferred by s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, does not apply to the present case. The purpose for which these pontoons are used is the same as that for which a dry dock would be constructed, but a dry dock could not be said to be land covered with water. The pontoons and the other parts of the appellants' hereditaments are all used as one set of premises. The respondents merely disregarded the piece of land which is in fact covered with water and rated the projecting portion of the appellants' premises. The floating pontoons are equivalent to hydraulic machines. If instead of the pontoons there were an ordinary wharf, it would make no difference as regards rateability that the owners had excavated the land. The land covered with water is of no value in itself. The whole premises of the appellants derive the benefit which accrues from the use of the pontoons. They are as much a part of the appellants' yard as a graving dock would be. They are not attached to the ground below them, and therefore the decision in *Cory* v. *Bristow* (2) does not apply. The decision in *Reg.* v. *Leith* (3) shews that when premises on dry land are enhanced in value by reason of something floating not rateable per se, the premises on dry land are increased in rateable value by the floating thing. The pontoons are merely accessories or adjuncts to the appellants' yard. The decisions in *East London Waterworks Co.* v. *Leyton Sewer Authority* (4) and *Reg.* v. *Morrison* (5) are in the respondents' favour. In *Reg.* v. *Morrison* (5) the Court would have come to the opposite conclusion if it had considered that the dock was sufficiently connected with the yard. But the dock was sometimes taken away altogether, and there was no necessary connection between it and the premises.

In the present case there is a necessary connection between the pontoons and the premises. In *Tyne Pontoons Co.* v. *Tynemouth Union* (1) it was held that pontoons were to be taken into

(1) (1897) 76 L. T. 782.
(2) 2 App. Cas. 262.
(3) (1852) 1 E. & B. 121.
(4) (1871) L. R. 6 Q. B. 669.
(5) 1 E. & B. 150.

account, not as being rateable in themselves, but as belonging to the premises. This land ceases to be land covered with water within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, by reason of the existence of the pontoons.

The appellants do not occupy land at the bottom of the river, which the excavated land has become, and the land has therefore ceased to be land covered with water within the meaning of s. 211, sub-s. 1 (*b*), of the Act of 1875. It is, for rating purposes, no more "land covered with water" than it would be if it were covered with buildings.

Ryde, in reply. It is conceded that the value of the appellants' premises is enhanced by the pontoons, but if the value of the land below them is enhanced by their presence it ought to be rated as land covered with water, and the exemption contained in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, applies.

Newport Union v. *Green* (1) shews that a point cannot be taken on the argument of a special case which was not taken in the Court below, and, as the respondents admitted before the Court of quarter sessions that if the pontoons ought to be rated as enhancing the value of that part of the land which had been excavated that part ought to be rated at one-fourth only of the net annual value thereof, they cannot now contend that the land is not "covered with water" because the pontoons float on the water.

CHANNELL J. The difficulty in this case arises by reason of the fact that the main part of the work of the appellants the dock company consists in repairing ships upon floating structures or pontoons, which are sometimes called floating docks, attached to their premises, and which rise and fall with the tide. The question is whether a certain part of the appellants' premises should be included in the rating, and, if so, whether it should be treated as land covered with water, and ought, therefore, to pay only a fourth of the whole rateable value. The appellants had premises abutting on the river Tyne. They excavated a considerable portion near to the then bank of the river to a considerable depth, and placed these structures,

(1) [1907] 2 K. B. 460.

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floating upon the water, which then flowed in, over the place that they had excavated, and attached them with moving arms to piles driven into the ground which was excavated. The piles were covered with wooden decking which could be removed, thus forming what has been called a false jetty or wharf on the premises.

The first point made on behalf of the respondents is that that land is not occupied by the appellants. There is no doubt that the appellants did occupy that portion of what now may be called the bed of the river. There is the river now flowing over it, but it is their own soil; it belonged to them before the excavation, and they excavated this place. They were in occupation of it as it formerly existed, and while they were excavating it; and now they do the most important part of their business over that site by repairing ships upon the floating pontoon. In my opinion this case is not analogous to those where a floating vessel has been anchored or moored in the stream of a river. In that class of case it has been held that where the vessel is moored by permanent moorings there is an occupation of so much of the bed of the river as is occupied by those permanent moorings. But I do not think it is necessary in the present case to resort to any considerations of that sort in order to shew occupation. There is distinct occupation of what is the appellants' own land. If it is necessary to shew that there was something fixed to the soil of this part of the river, there is something, because these arms are fixed to a pile which is stated to go into the part that has been excavated. But I do not myself think it is necessary to rely on that. In my opinion there is quite enough evidence of occupation—exclusive occupation—without it. The appellants may, if they think fit, place a chain outside these pontoons and shut them off from the river; and they can remove that chain when they wish to put a vessel on to one of the pontoons or take it off. If they did that, they would shew distinctly that they had the exclusive occupation of that which was inside the chain. But, quite independently of that consideration, it is perfectly clear, in my opinion, that there is occupation.

The next question we have to determine is whether that occupation is valuable. I am clearly of opinion that it is. On

behalf of the respondents it was pointed out that the pontoons are not rateable in themselves. That is admitted, for each pontoon is in the nature of a vessel or ship rising and falling with the tide, and probably is a chattel. I do not know whether it could be said to be a fixture inasmuch as it is to a certain extent fixed. But even if it is, that would not make the slightest difference; it is not rateable in itself. It is equally clear that the pontoons constitute a very large, if not the greater, part of the value of the whole shipbuilding premises. The contention on behalf of the respondents is that the pontoons can only be taken into account as enhancing the value of the wharf part of the yard to which they are attached by arms. I think it is quite possible that they might be taken into account as enhancing the value of that part, but they also clearly enhance the value of that occupation which I think the appellants have of the portion that may be called the bed of the river, that is to say, the portion which they excavated. The pontoons render that which might be an occupation of no practical value a most valuable occupation.

The respondents admitted that they had rated the pontoons merely as enhancing the value of the wharf part of the land, and as if there were no value given to the other part. As we are of opinion that the pontoons ought to come into the calculation for rating purposes as enhancing the value of that part of the hereditament over which the water of the river Tyne flows, we have an admission in the case that the assessment cannot be supported, and prima facie one would have thought that that would have been sufficient. But the question for the opinion of this Court is in a slightly different form, and if we are of opinion that the decision of the quarter sessions was correct (I am of opinion that it was not, for the reasons I have already stated) the decision is to stand; but if we are of opinion that the contention of the appellants stated in the case is correct, then the rate is to be amended in accordance with the agreement between the appellants and respondents mentioned in the case. But the contention of the appellants is that the land which has been excavated, and over which the pontoons float, is land covered with water. I therefore think that we cannot deal with the case simply on the footing that the respondents have admitted that

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the assessment cannot stand. Having regard to the way in which the case is stated, I think we have to deal with the other question, namely, whether this was land covered with water. I quite appreciate Mr. Ryde's objection on behalf of the appellants that the point was not made in the Court below. *Newport Union* v. *Green* (1) is a recent authority which supports the contention that under these circumstances the point cannot be raised in this Court, although I am not quite certain whether that decision applies to the present case. I quite agree with the general principle, and I do not desire to depart from it, but we have to consider the form in which this special case is stated, and it seems to me that it compels us to give an opinion on the question whether or not this is land covered with water. Even if we were not obliged to, it would be obviously desirable to do so, because although this agreement might be binding as regards the present rate, next year there might be another rate made on a different footing, and if we did not now indicate our opinion upon this point it would have to be argued again.

As to that point, I at first rather inclined to the opinion that this land was not "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The water is itself covered by these structures. There is but very little water that is exposed to the upper air or to the sky. There is a margin of a few feet round the pontoons, and that is the only part that is exposed to the upper air. It is necessary to consider the meaning of the expression "land covered with water." That term is introduced into the Public Health Act, 1875, as describing one of the various kinds of tenements and hereditaments which ought to pay at the lower rate. The reason for the exemption from payment in full does not depend on any question of value of the hereditament. So far as the value of the land is diminished by its being covered with water, that would be dealt with in assessing the rateable value of it; and the fact that such things as railways are placed in the same category obviously shews that the reason for the exemption does not depend upon any question of value. The tenements are placed within the exempted class because

(1) [1907] 2 K. B. 460.

they are considered not to have the full benefit which other tenements have from the expenditure which is made out of the proceeds of the district rate. It is a more or less arbitrary classification which the Legislature has made, because in all probability a great many tenements which are not placed within that class obtain quite as little benefit from the drainage and other matters which are paid for out of the district rate as that particular class does. The question is whether the land over which the pontoons float comes within the expression "land covered with water." The land is in fact covered with water. The water flows over it, but it has above it this floating structure which is practically a chattel. In my opinion the position is the same as it would be if there were an ordinary dock. When an ordinary floating dock is full a large portion, or it may be the whole, of the surface of the dock is covered by the vessels, barges and other things covering it, but it is still, nevertheless, land covered with water, and these chattels which are floating on the top of it do not prevent it being covered with water in the sense in which that phrase is used in the Public Health Act, 1875. I have therefore come to the conclusion that this land comes within the category of land covered with water. Therefore, not only are we able to find that the respondents' contention is incorrect, but that the appellants' contention is correct, and the rate must be amended in accordance with the agreement mentioned in the case. We have no concern with the figures. They have been agreed. It may be—if I am right in thinking that the pontoons enhance the value of the whole shipbuilding yard and the land part as well as the water part—that the whole value ought not to be attributed to the water part; we are not concerned with that. The one thing about which I have formed a clear opinion is that these pontoons do enhance the value of the water part, and that that water part is occupied by the appellants. In my opinion the appeal ought to be allowed, and the rate must be amended in the manner which will give effect to our opinion.

BRAY J. I am of the same opinion on both points. The first question is whether the pontoons ought to be rated as enhancing

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the value of that part of the hereditament over which the waters of the river Tyne flow. The history of the case seems to be that originally this land which is now covered with water was high and dry and was part of the premises; that the appellants desired to use it for another purpose, and thereupon they excavated it; that they allowed the water of the river Tyne to flow upon it, and put a pontoon in the water that rested upon it, attached to the rest of the premises.

Now it seems to me to be quite clear, for the reasons pointed out by Channell J., that the appellants have always been in occupation of this land. They were in occupation of it before it was excavated, and they did not cease to be in occupation of it after it was excavated. They excavated it, and they allowed the water of the river Tyne to come upon it for their own purposes, and put these pontoons upon that for their own purposes. That being so, can it be said that the land is of no value? The pontoons could not be used unless the land belonged to the appellants or they were in occupation of it. They would have no right unless they were in occupation of the land to put a pontoon upon it. It was equally necessary that the water should go upon the land in order that the vessel to be repaired might come up and be moved on to the pontoon and be raised by means of it. It therefore seems to me that the value of the land was undoubtedly enhanced by the use to which it was put. In my opinion the pontoons cannot be rated except as enhancing the value of that part of the hereditament, and the contention is correct that they ought to be rated as enhancing the value of that part. The pontoons, no doubt, are not rateable in themselves, but as enhancing the value of the land.

That being so, we have to deal with the second point, which I think, from the form in which the case is stated, it is necessary that we should decide, namely, whether that land is "land covered with water." The land is in fact covered with water. Is it the less land covered with water because in that water there are floating these pontoons? I cannot see that it is. It seems to me to come within the clear words of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, "land covered with water"; and, that being so, I think it is entitled to the

exemption. I am of opinion that on both points the appellants are entitled to succeed.

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SUTTON J. I agree.

Appeal allowed.

Solicitor for appellants: *B. Duncomb-Sells.*

Solicitors for respondents: *Gibson & Weldon, for E. B. Sharpley, Town Clerk, Tynemouth.*

J. E. A.

[IN THE COURT OF APPEAL.]

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1907

Dec. 13, 18.

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Compensation—Damage caused by exercise of Statutory Powers—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

The respondents, acting under the powers conferred by the Public Health Act, 1875, constructed an intercepting sewer, a pumping station, a sewage reservoir, and an outfall sewer, which were integral parts of, and together formed, one scheme of sewerage. The sewers were in part constructed on land the property of the claimant; the pumping station and the reservoir were constructed on land the property of other persons. The present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes:—

Held, that as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers" of the Public Health Act within the meaning of s. 308 of that Act, and consequently that the claimant was not entitled to any compensation under that Act in respect of that depreciation.

Judgment of Bigham J., [1907] 1 K. B. 14, affirmed.

APPEAL from the judgment of Bigham J. (1) on a case stated by an arbitrator.

On July 15, 1903, the respondents, being the local authority

(1) [1907] 1 K. B. 14.

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for the urban district of Colwyn Bay and Colwyn, gave to William Horton, the claimant, a notice under s. 16 of the Public Health Act, 1875, that it appeared necessary for the effectual draining of their district that certain sewers should be carried through certain lands of the claimant shewn on the plan annexed to the notice, and that they would after July 29 carry the sewers through the said lands accordingly. Subsequently to the date of the notice the respondents, acting under the powers conferred by the Public Health Act, 1875, made and carried out a scheme of sewerage, which, so far as is material to this case, consisted of an intercepting sewer, a pumping station, a covered reservoir, and an outfall sewer. On March 31, 1904, the claimant gave notice to the respondents that he claimed a sum of 10,654*l.* as compensation for the damage and injurious affection which the said sewage works would cause to his property. (1) The said claim was duly referred to arbitration, and on June 18, 1906, the arbitrator made his award in the form of a special case as follows:—

1. Colwyn Bay within the district of the respondents is a seaside watering place with a rapidly increasing population. In addition to Colwyn Bay there is an adjoining district called Llysfaen (not within the district of the respondents) the sewage of which is conducted into the sewage system of Colwyn Bay. The sewage of Colwyn Bay will be conducted by numerous connections at different places into the respondents' intercepting sewer and will pass through the portions of that sewer which are situate in the claimant's lands and thence to the pumping station. The pumping station consists of a sump or covered receptacle, pumps and a covered reservoir. The sewage is received from the intercepting sewer into the sump, whence it is pumped to the covered reservoir which is at a higher level. From the reservoir it will flow by gravitation through the outfall sewer and be discharged into the sea. All the works at the

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers . . ."

pumping station and the outfall will be used solely for the purpose of disposing of the sewage received from the intercepting sewer passing as aforesaid through the claimant's land.

3. The intercepting sewer was constructed as to part of its length in and through land the property of the claimant, and as to the remainder thereof in and through lands the property of other persons.

4. The outfall sewer was constructed as to part of its length in and through land the property of the claimant, and as to the remainder thereof in and through lands belonging to other persons.

5. The pumping station and covered reservoir were constructed upon land belonging to persons other than the claimant.

7. The claimant has suffered damage in respect of his lands in and through which the said intercepting and outfall sewers are constructed by the construction of the parts thereof which are within his said land to the extent of 871*l.* 10*s.* The respondents raised no objection to their legal liability to make compensation for damage under this head of claim if such damage was in fact caused, and the arbitrator awarded to the claimant in respect thereof the said sum of 871*l.* 10*s.*

9. The claimant has suffered damage in respect of a portion of his land and property by reason of the construction of the said pumping station and covered reservoir to the extent of 758*l.* 12*s.* 6*d.* The said damage is caused by the depreciation in present value of the said lands and property, and that depreciation is wholly due to the contemplated use of the said station and reservoir for sewage purposes. The arbitrator has not included any sum for such damages (if any) as may be hereafter recoverable by action for actual nuisance or negligence in the future user of the said works. The pumping station, reservoir, intercepting sewer and outfall sewer are integral parts of and form one scheme of sewerage.

The question for the Court is whether the claimant is entitled to recover the said sum of 758*l.* 12*s.* 6*d.* for the damage mentioned in par. 9.

Bigham J. gave judgment for the respondents. The claimant appealed.

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Sir Robert Finlay, K.C., and *Marshall, K.C.* (*McCardie* with them), for the claimant. The claimant is entitled to compensation for the depreciation in the value of his land through the contemplated user of the pumping station and reservoir for sewage purposes. The facts of the case bring it within the principle laid down in *Cowper-Essex* v. *Acton Local Board* (1) and *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools.* (2) The pumping station and the sewers which were laid in the claimant's land were all parts of one scheme of sewerage. If no sewage were to pass through the pipes in the claimant's land, the pumping station would be useless for the purpose for which it was erected, and its existence would not cause any depreciation in the value of the claimant's land. The matter which causes the injury thus takes place on the claimant's land, and the case falls within the class of cases in which it has been held that where part of a man's land has been compulsorily taken, and works are constructed on that part, and the future use of those works may damage the remainder of the man's land, that damage is an injurious affecting of the land not taken for which compensation is payable. This principle was originally laid down by Crompton J. in *In re the Stockport, Timperley and Altringham Ry. Co.* (3), and was approved of and applied by the House of Lords in the *Cowper-Essex Case* (1), and by the Court of Appeal in the *Tilbury Case.* (2) *Caledonian Ry. Co.* v. *Ogilvy* (4) and *City of Glasgow Union Ry. Co.* v. *Hunter* (5), which were relied on by the respondents in the Court below, are distinguishable, because, although in both those cases a part of the claimant's land had been taken, the works, the user of which caused the damage, were not erected on the land taken from the claimant, but on land taken from other persons. *Duke of Buccleuch* v. *Metropolitan Board of Works* (6) is in the claimant's favour. That case no doubt proceeded to a certain extent upon the fact that the claimant had had a causeway to the river, and the respondents had compulsorily acquired the land occupied by the causeway, yet the claimant was held to be entitled to compensation

(1) (1889) 14 App. Cas. 153.
(2) (1889) 24 Q. B. D. 326.
(3) (1864) 33 L. J. (Q.B.) 251.
(4) (1856) 2 Macq. 229.
(5) (1870) L. R. 2 H. L. Sc. 78
(6) (1872) L. R. 5 H. L. 418.

for damage caused to the rest of his property by the general user of the road, which only to a minute extent occupied the site of the causeway. *Rex* v. *Mountford* (1) was referred to by Bigham J. in his judgment as an authority against the claimant, but the real ratio decidendi of that case was that the land in question had not been taken for the purpose of the tramway undertaking, but in order that the road might be widened, and, therefore, the claimant was clearly not entitled to claim compensation for injurious affecting by reason of the working of the tramway. That this was so appears clear from the fact that in *London and North Western Ry. Co.* v. *Reddaway* (2) Phillimore J., who was a party to the decision in *Rex* v. *Mountford* (1), expressed his dissent from the view that compensation for injurious affecting can only be given in cases where the damage arises from the actual user of that part of the landowner's property which has been taken from him. Even if it cannot be said that the damage was caused in this case by the user of that part of the claimant's land which had been taken for the purpose of laying the sewers, it is sufficient to entitle the claimant to the further compensation claimed that there could have been no user of the pumping station so as to cause damage unless sewage passed through the pipes in the claimant's land, and therefore the claimant would have been, in the absence of compulsory powers, in a position to veto the whole scheme, and the claimant thus is able to bring himself within the principle of the *Cowper-Essex Case.* (3)

Macmorran, K.C., and *C. C. Hutchinson*, for the respondents. In this case no land belonging to the claimant was acquired by the respondents; under the Public Health Act, 1875, the local authority has power after notice to lay its sewers in the land of any person. For the purpose of argument, however, it may be assumed that the question of compensation is to be decided on the same principle as if some land of the claimant had been compulsorily acquired. In order to make his point good the claimant must shew that the cause of the injury of which he complains arises from something to be done on his land; but the use of the pipes laid in the claimant's land does not per se cause any

(1) [1906] 2 K. B. 814. (2) (1907) 23 Times L. R. 279.
(3) 14 App. Cas. 153.

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damage, and the existence of the pumping station would cause the same, if any, damage to the claimant if the sewage were conveyed to the pumping station through pipes laid in some other person's land. In both *Ogilvy's Case* (1) and *Hunter's Case* (2) a part of the claimant's land had been taken, but the injury arose through the user of a part of the railway on land which had not been taken from the claimants; and therefore it was held that they were not entitled to any compensation for injuriously affecting, their position being just the same as if none of their land had been taken. Those decisions dispose of the argument based on the fact that the pumping station and the sewers together formed part of one scheme for a sewerage system. There is no case which goes the length of saying that compensation must be based on the principle that a claimant some of whose land is taken is in a position to veto the undertaking unless his terms are given. The claimant has been paid compensation for having had placed in his land a pipe through which sewage will pass, and that is all the compensation that he is entitled to receive.

Sir Robert Finlay, K.C., in reply, referred to *Caledonian Ry. Co.* v. *Walker's Trustees.* (3)

Cur. adv. vult.

Dec. 18. LORD ALVERSTONE C.J. In this case we are asked to overrule the judgment of Bigham J., who held that the claimant was not entitled to a sum of 758*l.* There is no question as to his being entitled to a sum of 871*l.* 10*s.* in respect of land taken for the construction of certain sewers. The facts of the case are fully stated in the special case, and I shall only very briefly refer to them in order to make clear the point that was raised before us in argument. Mr. Horton, the claimant, was possessed of considerable estate in the neighbourhood of Colwyn Bay. The local authority were constructing a sewerage system, and in order to make that system effective they constructed a sewer in a portion of the claimant's land through which sewage would be carried to the pumping station, and in the other portion of the claimant's land they laid a sewer for the purpose of carrying

(1) 2 Macq. 229. (2) L. R. 2 H. L. Sc. 78.
(3) (1882) 7 App. Cas. 259.

the sewage away from the pumping station. Thus the land of the claimant was used for the purpose of carrying the sewage both to and away from the sewage works. The works themselves were not on the claimant's land. They consisted of a pumping station and reservoir at a distance of about a quarter of a mile from the point where the sewer of access left the claimant's land. At the pumping station the sewage was elevated to a sufficient level whence it flowed by gravitation through the sewer constructed in the second piece of the claimant's land to the sea.

It was contended by Sir Robert Finlay in his most interesting and able argument that, in addition to the compensation that was included in the 871*l.* for the damage done by the actual construction of the sewer in his land, the claimant was entitled to compensation for the general damage which he alleged was occasioned to his property by the construction of the whole of the sewage works, according to the principle recognized by the House of Lords in *Cowper-Essex* v. *Acton Local Board.* (1) Before dealing with this important question, I must refer to one or two matters which are of importance and must not be lost sight of, though they do not affect the general question. In the first place, I desire to point out that, for the purpose of constructing these sewers in the claimant's land, the local authority had not obtained special statutory powers to acquire land compulsorily. The power under which the sewers were constructed on the claimant's land is contained in a group of sections, Nos. 13 to 16, in the Public Health Act, 1875, and, more particularly, by s. 16 the local authority have power, after giving reasonable notice, to carry a sewer under any land in their district; and by s. 308 full compensation is to be paid for any damage sustained by any person by reason of the exercise of the powers of the Act. Therefore the case is not one in which the work in respect of which the claim to compensation arises has been constructed under special statutory powers. I do not say that that is very material, but I think that it should not be lost sight of, having regard to some of the views that have been expressed in the earlier cases as to the right of a claimant whose land is taken to exercise a veto, as it is said, upon the construction of the works.

(1) 14 App. Cas. 153.

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I desire to reserve the question, which in one sense does not arise in this case, as to whether the position of a person damaged by the construction of sewers under the Public Health Act is exactly the same as the position of a person whose land has been taken under the powers of the Lands Clauses Act; but for the purpose of my decision in this case I will assume that the position is the same, because, even making that assumption, I think that the argument addressed to us by Sir Robert Finlay on behalf of the claimant cannot be adopted.

I will first of all, as briefly as possible, state what is the effect of the law as it stands at present. I need not refer to *Hammersmith and City Ry. Co.* v. *Brand* (1) and the other cases which decided that no action will lie, apart from negligence, for an injury to land which is alleged to have been occasioned by the user of works authorized by statute; nor need I refer to the long list of cases which decided that in claims for compensation there cannot be included a claim for injury by user as distinct from construction. For a great many years it was thought, and eventually it was held to have been wrongly thought, that it made no difference as to the extent of a claim for compensation for injuriously affecting whether any land of the claimant had or had not been taken. The contrary view which had been expressed by Crompton J. in the well-known *Stockport Case* (2) was at one time thought not to be good law. But the question came under review in the House of Lords in the *Cowper-Essex Case* (3), and it must now be taken to have been decided by judgments which are of course binding upon us sitting in this Court, that a person whose land has been taken is entitled to compensation which he would not have been entitled to if none of his land had been taken, either on the ground, to use the language of some of the authorities, that he could have prevented the statutory undertaking from being carried out, and so could make his own terms, or on the ground that, inasmuch as some of his land was taken and an actionable trespass would, but for the statutory powers, have been committed, he was entitled to the full measure of common

(1) (1869) L. R. 4 H. L. 171. (2) 33 L. J. (Q.B.) 251.
(3) 14 App. Cas. 153.

law damage. The *Cowper-Essex Case* (1) was followed by *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools* (2), in which the principles laid down in the *Cowper-Essex Case* (1) were applied to the case of an interference with an easement by the construction of railway works. Whether or not the decision in the *Tilbury Case* (2) would stand to its full extent, if it were subject to further review, which it is unnecessary for us to consider, it must be taken, at any rate in this Court, as deciding that either the taking of a piece of land or the interference with an easement of property by the construction of works upon the land taken or within the area over which the easement is enjoyed—it is a little difficult to apply the actual language of the *Cowper-Essex Case* (1) to the *Tilbury Case* (2)—entitles the claimant to a larger amount of compensation than he could have got if none of his land been, or if no easement had been, interfered with. Lord Esher M.R., in his judgment in the *Tilbury Case* (3), said: "The plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act, and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights." Then Lord Esher M.R. referred to the judgments in the *Cowper-Essex Case* (1), and cited the passage from the Lord Chancellor's judgment (4), which shews that a person a part of whose land has been taken is in a better position than one who has had none of his land taken.

I will now consider how those authorities were utilized in Sir Robert Finlay's argument. He based his argument on two grounds. In the first place he contended that the facts of the present case

(1) 14 App. Cas. 153.
(2) 24 Q. B. D. 326.
(3) Ibid. at p. 329.
(4) 14 App. Cas. at p. 161.

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brought it directly within the principle of the *Cowper-Essex Case* (1), because, he said, the sewage passed through the pipe on the claimant's land, and, therefore, the matter complained of was done on the claimant's land, and consequently that it was unnecessary to consider the more difficult question whether the same principle applied when the work causing the damage was not constructed on land taken from the claimant. With great respect to that argument, it seems to me to involve a fallacy. After the sewer has been made the Public Health Act authorizes the local authority to maintain the sewer and to send the sewage through it; but to my mind it cannot be said that the passage of sewage through the pipe causes any damage to the land in which the pipe is situate for which the landowner can claim compensation. The landowner is, of course, compensated for what I may call the consequences of the sewer having been laid in his land, as, for example, for the loss of the opportunity of building over the site of the sewer or for injury occasioned to his estate through the presence in the surface of his land of manholes or ventilating shafts; but, having received compensation in respect of all matters of that kind, the landowner is not, in my opinion, entitled to say that the passage of sewage through the pipe injuriously affects the other portions of his land. Therefore the first ground on which the argument was based cannot be maintained. Sir Robert Finlay next contended that, although the pumping station was not on the claimant's land, it was of no use to the respondents unless the sewage could be brought to it; that the pumping station, when regarded simply as a building, did not injure the claimant's land, but that what did cause injury was the erection of a pumping station which was intended to be used in connection with a scheme for the disposal of sewage, and that as it was necessary for that purpose to pass the sewage through the claimant's land, the claimant was in a position to veto, not merely the construction of sewers on his land, but the carrying out of the whole system of sewage works. If that contention is sound, the claimant would be entitled to receive this further sum of money as compensation; but I desire to point out that the argument goes

(1) 14 App. Cas. 153.

a great deal further than anything that was suggested in the *Cowper-Essex Case* (1), and it seems to me that it is directly opposed to the principle that was recognized in *City of Glasgow Union Ry. Co.* v. *Hunter*. (2) I abstain from citing *Caledonian Ry. Co.* v. *Ogilvy* (3), because that case has undoubtedly been very much questioned; but Lord Watson in the *Cowper-Essex Case* (1), when referring to *Ogilvy's Case* (3) and to *City of Glasgow Union Ry. Co.* v. *Hunter* (2), said (4) that in both those cases "land had been taken from the claimants for railway purposes; but the use complained of as injurious was not of that part of the railway constructed on the land so taken, and was held in both cases to afford no ground for statutory compensation. It appears to me to be the result of those authorities which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers." That was a most carefully considered judgment, and if it is a correct statement of the law it impliedly negatives this argument that the claimant could have prevented the use of the pumping station for dealing with sewage. For these reasons I am of opinion that, applying the principle of the *Cowper-Essex Case* (1), the second branch of the argument for the claimant fails.

The case of *Rex* v. *Mountford* (5), a recent decision of Darling and Phillimore JJ., was referred to in argument by counsel for the claimant, who sought to distinguish it. In that case land had been acquired by a tramway company under its compulsory powers for the purpose of widening a road upon which the tramway was to be constructed. The tramway was laid not upon the piece of land so taken, but on the land of the road as it had originally existed. It was held that the claimant was not entitled to compensation for injury to his property by reason of the user of the tramway on the old piece of the road. If the argument for the claimant is right, that case was wrongly

(1) 14 App. Cas. 153.
(2) L. R. 2 H. L. Sc. 78.
(3) 2 Macq. 229.
(4) 14 App. Cas. at p. 166.
(5) [1906] 2 K. B. 814.

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decided, because the promoters were prohibited from using the tramway until the road had been widened, and, therefore, they necessarily had to take the piece of land from the claimant, and the claimant would thus, but for the statutory powers of the tramway company, have been in a position to veto the construction of the tramway. If the claim for compensation for injury to the claimant's land by the user of the tramway on the other part of the road had been admitted, it must have been on the ground that the case came within the principle of the *Cowper-Essex Case* (1); but Darling J., rightly in my opinion, recognized the distinction to which I have called attention, and I entirely concur with his judgment.

It was also said that Phillimore J., who was a party to the judgment in *Rex* v. *Mountford* (2), had delivered a judgment in *London and North Western Ry. Co.* v. *Reddaway* (3) which supported the claimant's case. In that case a somewhat curious state of things arose. The railway company, who were proposing to widen their line and to erect a station, did not intend to acquire any of the claimant's land, but he had a house very near the place where the line was going to be widened, and I think, also, near the site on which the station would be built though that does not appear quite clear from the report. However, it is not very material, and I will assume it was so. The claimant procured the insertion of a clause in the company's Act of Parliament providing that for the purpose of assessing compensation under the Lands Clauses Act he was to be treated as if the railway had been constructed on part of his land. In these circumstances it was contended before Phillimore J. on behalf of the railway company that the claimant was only entitled to claim compensation for injurious affecting due to the user of the railway as distinct from user of the station. Phillimore J. declined to adopt that contention. He said that the railway company had contracted to compensate him on the footing of some of his land having been taken for the purpose of the undertaking, and that the principle of the *Cowper-Essex Case* (1) therefore applied; and he declined to differentiate between the

(1) 14 App. Cas. 153. (2) [1906] 2 K. B. 814.
(3) 23 Times L. R. 279.

actual damage occasioned by the actual user of the railway and station and the damage which might have been caused in a hypothetical case, if the railway, but not the station, had been constructed on the claimant's land. I agree with that view. I think that the decision of Phillimore J. in the particular circumstances of that case was quite right, and that it is in no way inconsistent with the judgment of Bigham J. in this case. Bigham J. in his judgment, after referring to the *Tilbury Case* (1) and the *Cowper-Essex Case* (2), said: "I think it is clear that the exercise of the statutory powers referred to and contemplated by the learned judges in the *Tilbury Case* (1) consists of something done on the land taken from the claimant by the public body, or on land held by him. Such an exercise of the statutory powers alone concerns him. The statutory powers exercised elsewhere, though they may depreciate the value of his property, cannot in my opinion be relied upon for the purpose of increasing the compensation recoverable." In my opinion that is a perfectly accurate statement of the result of the authorities as they now stand, and if the principle of the *Cowper-Essex Case* (2) is to be extended so as to give a claimant the right to compensation for injury resulting from the user of land other than his own, it can only be done by a decision of the House of Lords. For these reasons I think that the judgment of Bigham J. was perfectly correct, and that the claimant is not entitled to recover more than the 871*l*. This appeal must therefore be dismissed.

BUCKLEY L.J. read the following judgment:—The decision of Crompton J. in *In re the Stockport, Timperley and Altringham Ry. Co.* (3) has been much criticized, but has been approved in the House of Lords. Crompton J. there put the two cases—first, where the damage is occasioned by what is done upon other land which the company have purchased, and, secondly, where the mischief is caused by what is done on the land taken from the claimant, and held that in the former case the claimant was not, and in the latter he was, entitled to compensation for

(1) 24 Q. B. D. 326. (2) 14 App. Cas. 153.
(3) 33 L. J. (Q.B.) 251.

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something which would not have been actionable as against the company, but which became by exercise of the compulsory powers of the Act subject-matter for compensation. The principle of the *Stockport Case* (1) was applied and extended by the House of Lords in *Cowper-Essex* v. *Acton Local Board* (2) to this extent, that, if the claim is by a person from whom land has been taken compulsorily, he may have compensation for damage sustained by the injuriously affecting of other lands of his, and such damage is not confined to damage in construction, but extends to damage in user of that which is constructed on the land taken from him.

But no case has been cited, and none I think exists, in which the doctrine has been applied to damage occasioned by works erected upon land not taken from the claimant. On the contrary, there is authority that in that case the principle does not apply. In *City of Glasgow Union Ry. Co.* v. *Hunter* (3), which was a case of that kind, Lord Chelmsford said (4): "But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken, but from the construction of a railway bridge over the land of another person." And at p. 83 he laid down this proposition, that as no part of the claimant's property had been injured by anything done on his land, his right to compensation for damage was precisely the same as if none of his land had been taken by the company. Lord Watson in the *Cowper-Essex Case* (2) intended, I think, to affirm the same proposition. After referring to *Caledonian Ry. Co.* v. *Ogilvy* (5) and *City of Glasgow Union Ry. Co.* v. *Hunter* (3), and pointing out that in those cases the use complained of as injurious was not of that part of the railway which was constructed on the land taken from the claimant, he said (6): "It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of

(1) 33 L. J. (Q.B.) 251.
(2) 14 App. Cas. 153.
(3) L. R. 2 H. L. Sc. 78.
(4) L. R. 2 H. L. Sc. at p. 82.
(5) 2 Macq. 229.
(6) 14 App. Cas. at p. 166.

works to be constructed upon the land which has been taken from him under compulsory powers. The construction of the Act which has been thus adopted by the House had previously been enforced by Crompton J. in the *Stockport Case*." (1)

It is, however, argued that *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools* (2) contains a principle not inconsistent with that of the cases above referred to, and which governs this case. In my opinion that is not so. The legal proposition involved in the *Tilbury Case* (2), I think, is that if an actionable wrong has been done to the claimant he is entitled to recover all the damage resulting from that wrong, and none the less because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable. The facts were that the claimant was entitled to lights which were, and to lights which were not, ancient. A building was erected so as to cause damage to both the ancient and the modern lights; he could have stopped that building by injunction, because it interfered with his ancient lights. It was held that the damage he could recover was not confined to the injury to his ancient lights, but extended to the injury to all his lights, whether ancient or modern. The *Stockport Case* (1) and the decisions which have followed it are concerned with the case where no actionable wrong has been done to the claimant but he has by compulsory powers become entitled to compensation. The *Tilbury Case* (2) is concerned with the case where an actionable wrong has been done to the claimant. It decided that the claimant, entitled as he is to sue by reason of that wrong, may in that action recover all the damage he has sustained, including damage which he could not have recovered if this latter had been the only damage done him. The present case is of the former, not of the latter, class.

In the present case no land was compulsorily taken from the claimant. A notice was given him under which the local authority were entitled to lay pipes through his land, and there resulted to him a right of compensation under s. 308 of the Public Health Act, 1875. I do not, however, draw

(1) 33 L. J. (Q.B.) 251. (2) 24 Q. B. D. 326.

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any distinction based upon the fact that an easement, and not land, was thus acquired. The pipes laid in his land served to assist in conducting sewage to and from the pumping station and reservoir, but these latter were not on his land. He is entitled to compensation for the damage in respect of his lands in and through which the sewers are constructed. This is the 871*l.* 10*s.* awarded to him, in respect of which there is no question. The question is whether he can claim compensation for his land being injuriously affected by the existence of the pumping station and reservoir. Their erection and user is no actionable wrong. The question is whether the compulsory taking of the easement from him has given him a right to compensation under s. 308 for the injury done to his adjoining land by their erection and their user. He had no right to complain of or to prevent the erection of the pumping station and reservoir. There is no circumstance similar to the obscuration of such of the lights as were ancient in the *Tilbury Case*. (1) That decision, in my opinion, does not apply.

The appellant argues that he is within the *Stockport Case* (2) and the *Cowper-Essex Case* (3), upon the ground that the pumping station and reservoir, though situate on land other than land of the claimant, forms with the sewers laid in his land one sewage undertaking. The test, however, is not whether the whole forms one undertaking—a railway undertaking is one undertaking. The test is whether that part of the undertaking which lies on the claimant's land has created the injury to the claimant's adjoining lands. Then the appellant says, truly, that the pipes which are laid in the claimant's land are used to take the sewage to, and to carry it from, the pumping station and reservoir. The erection of these works, however, is not a necessary consequence of the laying of the pipes in the claimant's land, and further their erection and user might have taken place if the sewage had been taken to and from the works by pipes not laid in the claimant's land. The laying of the pipes in the claimant's land is not the causa causans, but at most a causa sine qua non of the erection and user of the reservoir and

(1) 24 Q. B. D. 326. (2) 33 L. J. (Q.B.) 251.
(3) 14 App. Cas. 153.

pumping station. The act done on the claimant's land was not an act which caused the injury arising from the erection of the reservoir and pumping station, but an act (at most) without which the injury would not have been done. But for the statute the laying of the pipes and the conduct of sewage through the pipes would have been a trespass against the claimant, but for all that he has received compensation. This other damage represented by the 758*l.* 12*s.* 6*d.* is damage caused by the works not on the claimant's land, to which the principle of the *Stockport Case* (1) and the *Cowper-Essex Case* (2) does not, in my judgment, apply. I think the appeal fails, and must be dismissed.

KENNEDY L.J. I entirely agree, and have nothing to add.

Appeal dismissed.

Solicitors for claimant: *Cunliffes & Davenport, for Chamberlain & Johnson, Llandudno.*

Solicitors for respondents: *Sharpe, Parker, Pritchards & Co., for Power, Amphlett & Jones, Colwyn Bay.*

(1) 33 L. J. (Q.B.) 251. (2) 14 App. Cas. 153

F. O. R.

C. A.
1907
Nov. 29;
Dec. 2.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.
Ex parte THE DEBTOR.

Bankruptcy—Bankruptcy Notice—Receiving Order—Bill of Exchange—Conditional Payment—Dishonoured Bill—Bill outstanding in Third Party—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

The acceptance by a judgment creditor of a bill, or promissory note, for the amount of his debt operates as an agreement not to enforce that debt during the currency of the bill, and afterwards, notwithstanding dishonour, so long as the bill is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor.

A creditor who had accepted a bill of exchange for the amount of his judgment debt, which was dishonoured but was outstanding in the hands of a third party, issued a bankruptcy notice upon the judgment under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*):—

Held, that this was not a debt on which a bankruptcy notice could be served, and that the notice and a receiving order made upon it must be set aside.

APPEAL from a receiving order made by one of the registrars in bankruptcy.

The question raised by this appeal was whether a bankruptcy notice, the failure to comply with which was the act of bankruptcy alleged in the petition, was, under the circumstances, a good bankruptcy notice upon which a receiving order could be made. The facts as found by the Court were as follows:—

The petitioning creditor was a solicitor; the debtor was his client.

In July, 1906, the creditor brought an action against the debtor for bills of costs in which a compromise judgment was signed on November 8 for 185*l.*

The debtor paid 70*l.* in part satisfaction of this amount, and for the balance, 115*l.*, a bankruptcy notice was served.

On November 20, 1906, the debtor accepted a bill at one month for 120*l.* (115*l.* the balance of the debt, and 5*l.* for the costs of the bankruptcy notice) drawn by the creditor. This was accompanied by the following letter from the creditor's firm: "It is to be distinctly understood that the bill is not in any way accepted in settlement of the judgment or as a compliance with

the terms of the bankruptcy notice, but it is to be handed to [the creditor] simply to enable him to meet your wish to give you further time to pay the amount owing."

The bill was indorsed by the creditor in blank and handed by him to his bankers, the London and South Western Bank, with a request that the bank would discount it and place the amount to the credit of his account, which at this time, and during all the period material to be considered, was overdrawn. The bank in reply wrote as follows: "The bill we shall hold until due, when we will collect it. We are unable to discount it, not being a trade bill, and not being payable at a bank. It is not indorsed; will you kindly call and indorse it."

On December 23, 1906, the bill was presented by the bank and dishonoured.

In the early part of 1907 the bank, not being satisfied with the state of the creditor's account, which was still overdrawn, informed him that unless something was done to reduce his overdraft they must put all their securities in force, and they subsequently applied to the debtor, as the acceptor of the bill, and obtained 5*l.* from him on account. The creditor's account was at this time about 200*l.* overdrawn.

On February 26, 1907, the bank wrote to the debtor threatening him with proceedings; but none were in fact taken.

On May 3, 1907, a bankruptcy notice for 115*l.* was issued, and served on the debtor on May 8, and expired on May 16.

On May 30, 1907, the bill was handed back to the creditor by the bank.

On August 2, 1907, the creditor presented a petition for a receiving order against the debtor, alleging that he was indebted to the petitioner in the sum of "115*l.* being the balance due on final judgment obtained by me in the High Court of Justice on 8th day of November, 1906, whereon execution has not been stayed."

The act of bankruptcy alleged was the non-compliance by the debtor with the requirements of the bankruptcy notice of May 3, 1907.

On November 1, 1907, the registrar made a receiving order against the debtor on this petition.

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The debtor appealed.

The appeal was heard on November 29 and December 2, 1907.

C. A. Russell, K.C., and *Willis*, for the debtor. The petitioning creditor was not in a position to present a petition, because this bill was outstanding in the hands of a third party; and the fact that the bill was in respect of a judgment debt makes no difference. The taking of the bill is evidence of an agreement by the creditor to suspend his remedy upon the judgment during the currency of the bill: *Baker* v. *Walker* (1); *Palmer* v. *Bramley* (2); *Ex parte Matthew*. (3) This bill was not in the hands of the banker for collection only. The customer's account being overdrawn, the banker's lien attached on the deposit of the bill, and the fact that the bill was put into the hands of the banker for a special purpose did not deprive him of his lien.

Hogg, for the creditor. This bill was the property of the customer, and not of the banker: *Thompson* v. *Giles*. (4)

[FARWELL L.J. In that case the balance of the account was in favour of the customer; but when the balance is in favour of the banker for all practical purposes, he is the owner of the bill. It all turns on the state of the customer's account.]

It is not enough for the debtor to say that he is embarrassed by the action of the creditor and does not know whom to pay; he must shew that the creditor by his conduct has prevented him from complying with the bankruptcy notice: *In re Dennis* (5), where a receiving order founded upon non-compliance with a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*), was allowed to stand notwithstanding garnishee proceedings.

[FLETCHER MOULTON L.J. In that case there was a valid bankruptcy notice at the date of service, which distinguishes that from the present case.]

This bankruptcy notice was good on the bare language of s. 4, sub-s. 1 (*g*), because execution for the debt had not been stayed; at any rate, the right to put in execution was only suspended during the currency of the bill, and when the bill became overdue

(1) (1845) 14 M. & W. 465.
(2) [1895] 2 Q. B. 405.
(3) (1884) 12 Q. B. D. 506.
(4) (1824) 2 B. & C. 422.
(5) (1888) 60 L. T. 348.

there was no longer any suspension. A judgment creditor who has made an equitable assignment of the judgment debt can still issue a bankruptcy notice in respect of that debt: *In re Palmer, Ex parte Brims.* (1)

As a fact, the bill was not parted with to the bank; it was sent to the bank for collection, and at the time the petition for a receiving order was presented the bill was in the creditor's possession, and he was in a position to hand it over to the debtor, and receive payment of the debt had payment been made or tendered. The bankruptcy notice was therefore good, and a sufficient foundation for the receiving order.

C. A. Russell, K.C., in reply. The respondent endeavours to draw a distinction as to the creditor's rights during the currency of the bill and after its non-payment; which cannot be supported. During the currency of the bill the creditor could not avail himself of a bankruptcy notice to obtain a receiving order: *Ex parte Matthew* (2); when the bill was dishonoured it was outstanding in the hands of a third party. It is settled by *Baker* v. *Walker* (3), *Belshaw* v. *Bush* (4), and *Davis* v. *Reilly* (5) that the remedy of the creditor is suspended, even after dishonour, where the bill is outstanding in the hands of a third party. And that it is not enough to entitle the creditor to succeed that he is in possession of the bill at the date of the petition; he must be in a position to receive payment when the bankruptcy notice is served.

Hogg replied on the fresh cases cited in reply.

COZENS-HARDY M.R. This is an appeal from the decision of the learned registrar, who has made a receiving order against the debtor based upon a bankruptcy notice, which raises points of law of, to me, at least, very considerable difficulty in the first instance. That the debtor owed the money to the petitioning creditor is perfectly clear. There was originally a bill of costs for a large amount, there was a writ, and then there was a compromise judgment in the year 1906, the result of which was that a balance of 115*l.* was due from the debtor to the creditor, and in November, 1906, a bill for 120*l.* was accepted by the debtor

(1) [1898] 1 Q. B. 419.
(2) 12 Q. B. D. 506.
(3) 14 M. & W. 465.
(4) (1851) 11 C. B. 191, at p. 200.
(5) [1898] 1 Q. B. 1.

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and handed to the creditor. That bill was indorsed by the creditor in blank, and handed by him to his own bankers. The creditor's account at this time, and during all the period that is material to be considered, was overdrawn. The bill was originally handed by the creditor to the bank with a request that the bank would discount it and place the amount to the credit of the creditor's account. [Having stated the bank's reply as set out above, the Master of the Rolls continued:—] In the early part of the present year the bank were evidently not satisfied with the state of the account of their customer, and he was informed that unless something was done they must put all their securities in force, and they applied to the debtor, the acceptor of the bill, and obtained 5*l.* from him on account, and finally on February 26, 1907, they wrote a letter to the debtor threatening him with proceedings. It cannot be disputed on these facts that the bank, as holders of this bill, had, to put it at the lowest, a right to retain the proceeds of the bill for the amount of the overdrawn account which exceeded the amount due on the bill, and it cannot be doubted that the bank had a right to sue on this bill, and that the debtor would have had no answer to it, as the bill was overdue. [After referring to the bankruptcy notice of May, 1907, the Master of the Rolls continued:—] Under those circumstances the question which we have to consider is whether that was a good bankruptcy notice and a good foundation upon which a receiving order ought to be made. In my opinion, having heard the case fully argued, I think it was not, and that the appeal must be allowed.

What was the effect of taking the bill, the debtor's acceptance, in the manner in which it was taken? I think the authorities which have been cited to us shew that what was done operated as an agreement not to sue, and an agreement not to sue not merely during the currency of the bill, but afterwards, notwithstanding dishonour, so long as the bill was outstanding in the hands of a third party. The authorities which have been called to our attention seem to me to establish that proposition beyond question. The case of *Baker* v. *Walker* (1), which contains Parke B.'s dictum, and the very important case of *Belshaw* v. *Bush* (2), where the point was raised distinctly on demurrer, and

(1) 14 M. & W. 465. (2) 11 C. B. 191.

the more recent case of *Davis* v. *Reilly* (1), seem to me to establish the proposition beyond question, and if so it cannot possibly be right that the creditor should be allowed to present a bankruptcy notice, and found upon it a petition in bankruptcy, when he has, by taking this bill, agreed that he will not enforce his rights, and agreed that he will suspend his remedies, not only during the currency of the bill, but afterwards while the bill is in the hands of a third party. For these reasons I think the decision of the learned registrar was wrong, and that this appeal must be allowed and the receiving order discharged.

FLETCHER MOULTON L.J. I am of the same opinion.

The extremely able argument of Mr. Hogg raised all the points that could be raised on behalf of the respondent in this case and did so in a way which has much assisted me in common with the other members of the Court. He relies on the bare language of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, and says that this bankruptcy notice was good because the creditor had obtained final judgment, and execution had not been stayed upon it. There might have been a question as to whether those words are to be taken in their strictest literal sense, i.e., whether they refer solely to a formal stay by order made in chambers or in Court suspending the right to enforce execution. But Mr. Hogg very properly felt that he could not press it so far as that. He admitted that by taking the bill in the present case his client had suspended during the currency of the bill the right to issue execution, and that this operated to prevent his serving a bankruptcy notice by reason of its bringing him within the words "execution having been stayed," although no formal stay had been ordered at chambers. In other words, when there are circumstances under which the Court would, if applied to, prevent the issue of execution, those circumstances may bring the case within the interpretation which the Court has put upon the words "execution having been stayed." So we start the consideration of this question with the admission on both sides that execution may be stayed so as to prevent a bankruptcy notice being served under s. 4, sub-s. 1 (*g*), even though no formal stay has been made in chambers.

(1) [1898] 1 Q. B. 1.

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But Mr. Hogg says the true effect of this principle is only to create a suspension of the rights of the creditor during the currency of the bill, and that when the bill became overdue this suspension came to an end. That contention, in my opinion, is unsustainable. A parallel case where a bill is taken in payment of a debt, say for instance in payment for goods sold, exactly illustrates what is the effect of taking a bill. It is perfectly true that it is only a conditional payment. It is a payment if the bill is paid, and if it is in your hands when it becomes due and is dishonoured the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession so that the right to proceed on that bill is vested in some one else and not in you at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. A moment's consideration will shew that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of the goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again. Therefore I am satisfied that it is a fundamental principle applying to all cases where bills are taken either in satisfaction of a debt or in suspension of the exercise of any legal rights, that the satisfaction or the suspension lasts only so long as the bill is not overdue, unless you have parted with it so that another person is dominus of the bill, and then it lasts until you have got it back into your possession. When you have got it back you can wipe it out, and the debtor can no longer say, "There is an outstanding bill which suspends your right." The answer is, "You cannot rely on a bill which you have failed to pay, and which bill is in my possession."

Mr. Hogg also contends that here the bill was not parted with. That is a question of fact. In my opinion, for the reasons that have been given by the Master of the Rolls, it is clear that in fact it had been parted with. It had been indorsed, so that the rights under the bill were enforceable by the holder of it. It had been passed by Mr. Hogg's client to his bank as part of the securities for the overdraft which then existed, and which for all times

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material to the present question continued to exist. Further than that, the bank was actively asserting its right as holder of the bill. It had threatened the drawer of the bill, and had actually got 5*l.* paid on account; and in my opinion the creditor could not at that moment have obtained possession of the bill as of right, because it was a substantial part of the security in the hands of his bank on which they had allowed this overdraft. They were legally the holders of the bill, and for all purposes the bill was out of the hands of the creditor and in the hands of a third party. That being so, the case appears to me to be made out for the invalidity of this bankruptcy notice. Then Mr. Hogg suggests, "It may be that we were not holders of the bill at the date of the bankruptcy notice, but the question of our possession of the bill is a matter to be considered when the bankruptcy petition comes on. By that time we had the bill, and that is enough." But it cannot be so. The question is whether the non-payment was an act of bankruptcy. That must be decided by the state of things existing at the moment of service. This follows from the fact that its legal consequences are immediate, for when you have an act of bankruptcy, any one who deals with the party subsequently to that act of bankruptcy does so at his peril. It is of no use to say, "I was in a position to receive payment when the hearing of the petition for bankruptcy came on." You have to shew that you were in a position to receive payment at the date when you served the bankruptcy notice. The debtor could not safely pay you when he received that notice. If he had done so, and you had committed an act of bankruptcy, or had gone bankrupt, the money that had been paid by him to you would have been no answer whatever to the claim which the bank could have made against him. Therefore, the debt for which the bill was given was not a debt on which the bankruptcy notice could have been served, and that notice must be set aside, together with all the subsequent proceedings.

FARWELL L.J. I am of the same opinion.

The bankruptcy notice requires the debtor to pay within seven days. At the date at which it was served there was, in my

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opinion, an agreement in existence between the debtor and the creditor that the debt should be suspended. I find that agreement partly from the letter of November 20, 1906. [The Lord Justice read it, and continued:—] On the authority of the case of *Baker* v. *Walker* (1) and of the case of *Belshaw* v. *Bush* (2), I think it is plain that the giving of the bill for the amount of the judgment debt operates as an agreement not to enforce that judgment debt during the pendency of the bill or thereafter so long as that bill is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor. In this case the bill was undoubtedly indorsed. Nor do I think it is material to consider the somewhat nice point of property in the bill, because it is plain, for the reasons given by the Master of the Rolls, that the bank could have sued. They did threaten to sue, and they gave notice to the debtor that his creditor's securities were required for the purpose of paying off his overdraft, and that they were proposing to realize them. It appears to me, therefore, that this case falls to be decided on the existence of an agreement then pending not to enforce the judgment debt, and that we are not in any way hampered by the decision of the case of *In re Dennis* (3), which was the case of a garnishee order, or by the more recent case of *In re Palmer, Ex parte Brims* (4), which was the case of a trustee and cestui que trust, because there was no question in either of those cases of any agreement. The matter there turned on the validity of the notice, which might have been set right, so far as the equitable interests were concerned, when the petition came to be presented. But here no such thing can arise when there has been, in my view, an actual agreement not to enforce the judgment during the period it is to run. I agree, therefore, that the appeal must be allowed, and that not only the receiving order, but the bankruptcy notice, must be set aside with costs.

Appeal allowed.

Solicitors: *George Castle; Sadd & Stollard.*

(1) 14 M. & W. 465.
(2) 11 C. B. 191.
(3) 60 L. T. 348.
(4) [1898] 1 Q. B. 419.

W. C. D.

[IN THE COURT OF APPEAL.]

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Nov. 22, 25.

BROMLEY RURAL DISTRICT COUNCIL *v.* CROYDON CORPORATION.

Highway—Extraordinary Traffic—Repair of Highway—Recovery of Expenses —Limitation of Time for bringing Action—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

A municipal corporation, requiring road material for the general purposes of the maintenance and construction of roads within their district, entered into contracts with two contractors whereby the contractors agreed to supply and deliver to the corporation, during the twelve months from March 31, 1904, to March 31, 1905, flints and ragstone, in such quantities and numbers, at such times and in such manner as the corporation should from time to time by order in writing direct. The plaintiffs, as the authority liable for the repair of highways in their district, incurred extraordinary expenses in repairing a highway in consequence of damage done to it by extraordinary traffic conducted over it in the haulage of stones by the contractors for the fulfilment of their contracts with the corporation. The last load of stones was carried on March 31, 1905, and on August 22, 1905, the plaintiffs commenced an action against the corporation for the recovery of the extraordinary expenses:—

Held, that the traffic was conducted in consequence of the orders of the corporation.

Held, also (reversing the decision of Walton J., [1907] 2 K. B. 39), that the damage was not the consequence of "any particular building contract or work extending over a long period" within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, and that therefore, under the first part of that sub-section, the plaintiffs could recover only the expenses incurred within twelve months before the commencement of the action.

APPEAL by the defendants from the decision of Walton J. at the trial of the action without a jury. (1)

The action was brought to recover the sum of 698*l.* 15*s.* 5*d.*, the amount of extraordinary expenses alleged to have been incurred by the plaintiffs in repairing highways by reason of excessive weight passing along the same and extraordinary traffic thereon.

The plaintiffs were the authority liable to repair the highways in the Bromley district and by their statement of claim alleged

(1) [1907] 2 K. B. 39.

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that they had suffered damage by reason that they had incurred extraordinary expenses in repairing a highway from Farnborough to West Wickham, in the county of Kent and the Bromley district, by reason of the damage caused by excessive weight passing along the same and extraordinary traffic thereon, such weight or traffic having been conducted by, or in consequence of, the order of the defendants.

By their defence the defendants relied on (inter alia) s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898. (1)

The highway in question was that part of the road from Farnborough to Croydon (about three miles five furlongs in length) which was within the district of the Bromley Rural District Council. The traffic upon the road which was said to have constituted extraordinary traffic was the haulage by means of traction engines of certain flints and ragstone for the defendant corporation. The haulage was done by two contractors, each of whom had entered into a contract with the defendant corporation to supply and deliver to the corporation during the twelve months from March 31, 1904, to March 31, 1905, the stones named in the schedule to the contract in such quantities and numbers, at such times and in such manner, as the corporation, or any person duly authorized by them, should from time to time by order in writing direct.

The stones were required by the defendant corporation for the general purposes of the maintenance of roads in their district and for the construction of new streets.

Haulage by the contractors under these contracts took place every month, except October, from March 31, 1904, until the cartage of the last load on March 31, 1905; and the claim was

(1) The Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1: "Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows: . . . . (*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work. (*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

in respect of damage done between those two dates. The writ in this action was issued on August 22, 1905.

Walton J. found that the traffic during the period from March 31, 1904, to March 31, 1905, was extraordinary traffic, and that the amount of damage done by that traffic was 350*l.*; and he held that the work done under each of the two contracts must be treated as similar to work done under a "building contract," and as "work extending over a long period," within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, so that the plaintiffs were entitled to recover the whole of the 350*l.* He further found, in case he should be wrong upon his construction of that sub-section, that if the plaintiffs were only entitled to expenses in respect of the damage done within twelve months before the commencement of the action the sum which they could recover was 150*l.* He also held that the traffic was conducted in consequence of the orders of the defendant corporation, because when they entered into the two contracts they knew perfectly well that the work would be done by traction engines.

The defendants appealed.

Danckwerts, K.C., and *Hohler*, K.C. (*Colam* and *Charles* with them), for the defendants. The contracts between the corporation and the contractors were merely for the supply and delivery at Croydon of stones in such quantities as the corporation might order. It is clear that, so far as regards the corporation, who wanted the stones for general purposes only, there was no "work" within s. 12, sub-s. 1 (*b*). Whatever may be the exact meaning of the latter part of that sub-section, it is enough to contend in this case that a contract for the supply of goods at intervals during a specified period is not a "work extending over a long period." The sub-section should be read as applying to "any particular building contract or any particular work." The word "work" there does not mean labour; it is applied to the thing done, and means a work of construction or demolition or something ejusdem generis. It must be not merely continuous, but one entire work. There must be a unity of work, as was said by Vaughan Williams L.J. in *Kent County Council* v. *Folkestone*

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Corporation. (1) The reasoning of the judgments in that case is in the defendants' favour. There the contract was for haulage, not, as here, for the supply of goods. There is nothing in these two contracts requiring the contractors to make use of this particular road. The sub-section speaks of damage which is "the consequence of a building contract or work." That must mean damage which would not have occurred but for the existence of the building contract or work. It is not the giving of the order which creates the liability, but the doing of the damage: *Epsom Urban District Council* v. *London County Council.* (2) [They cited also *Lancaster Rural District Council* v. *Fisher and Le Fanu.* (3)]

Secondly, the damage did not occur "in consequence of" the defendants' order. It was not the natural consequence of their order: *Egham Rural District Council* v. *Gordon.* (4) The contractors could bring the stones to Croydon in any way they liked. The defendants had no control over the means of carriage. Their knowledge that the contractors would use traction engines is no evidence of control. "Order" implies direct control: *Lord Gerard* v. *Kent County Council.* (5)

Macmorran, K.C. (*Hansell* with him), for the plaintiffs, was only called upon with reference to s. 12, sub-s. 1 (*b*). The damage to this road was caused by the continuous user of the road arising out of one matter. That which was done under the contracts, which were to last for twelve months, was "work extending over a long period." The "work" is the haulage under the contracts: *Kent County Council* v. *Folkestone Corporation* (1); and the time begins to run from the completion of the work that caused the damage which gave rise to the cause of action: *Lancaster Rural District Council* v. *Fisher and Le Fanu.* (3)

Danckwerts, K.C., replied.

Cur. adv. vult.

LORD ALVERSTONE C.J. The question here is one of considerable difficulty. The expenses incurred by reason of the extraordinary

(1) [1905] 1 K. B. 620.
(2) [1900] 2 Q. B. 751.
(3) [1907] 2 K. B. 516.
(4) [1902] 2 K. B. 120.
(5) [1897] 1 Q. B. 351.

traffic amount to 350*l.*, and as all the damage was done in the twelve months ending March 31, 1905, and the writ in the action was not issued till the following August 22, it is clear that, if the case comes within the first part of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, the plaintiffs cannot recover the whole of that 350*l.* It is contended, however, on their behalf that their case comes within the second part of the sub-section, which deals with the case "where the damage is the consequence of any particular building contract, or work extending over a long period," and provides that in such case proceedings for the recovery of the expenses shall be commenced "not later than six months after the completion of the contract or work." We have to construe this legislation. I have no doubt that the Legislature, in referring in this sub-section to a building contract, meant to deal with the common case of a building contract which involves a great amount of carting of such a nature that the road must remain cut up as long as the building operations are going on. The intention of the Legislature was that proceedings for the recovery of expenses might be taken within six months after the expiration of the building contract. Then, after referring to "any particular building contract," they added the words "or work extending over a long period." It is not perfectly plain to my mind whether the words "any particular" are to be applied to the words "work extending over a long period"; but, on the whole, I think that the fair reading of the clause must be "where the damage is the consequence of any particular building contract or is the consequence of any particular work extending over a long period." One can imagine many cases to which these latter words would be applicable, such as the construction of great reservoirs, or railway embankments, or the removing of some vast mass of earth; but I think that they point to some particular piece of work being done, either by the contractor or by the person employing him. In my opinion we should be unduly extending the words of the Act if we were to say that a contract for the supply of materials for any given period was a particular work extending over a long period. In this case the stones were to be delivered by the contractors in such manner as the Croydon Corporation should

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direct, and the amount to be carted depended on the orders given by the corporation from time to time during the whole period of twelve months. It would not be in accordance with the proper construction of the Act to hold that in this case there has been a work extending over a long period. The judgments delivered in the Court of Appeal in *Kent County Council* v. *Folkestone Corporation* (1) were cited, and on the defendants' behalf reliance was especially placed on the words used by Vaughan Williams L.J. when he said that the work mentioned in this sub-section implied a unity of work. His observations certainly tell in the defendants' favour. On the other hand, Romer L.J. said he thought that the real "work" was that which was being done by the contractors under the contract between them and the corporation; that "it was that work and that alone which necessitated the haulage which caused the damage, and that haulage clearly came to an end long before the six months preceding the commencement of the action." It was contended from the use of that language that Romer L.J. thought that the action could not have been maintained if the haulage had ceased more than six months before the issue of the writ, but it seems to me probable that that was not in his mind at all. In the case of *Lancaster Rural District Council* v. *Fisher and Le Fanu* (2) the damage was caused to the road by the haulage of water pipes by the defendants, who had contracted both to lay certain water pipes and to maintain them for twelve months afterwards. The laying of the pipes was completed more than six months before the issue of the writ, and the Master of the Rolls said that the six months began to run from the completion of the work causing the damage which gave rise to the action, not from the completion of the entire contract, which included the maintenance of the pipes for a year after they had been laid. The judgment is not inconsistent with the contention put before us on behalf of the plaintiffs that the Court of Appeal meant to recognize that the six months should be calculated from the termination of the contract for the work, even though it lasted for an indefinite period of time.

I therefore come to the conclusion that this action is only

(1) [1905] 1 K. B. 620. (2) [1907] 2 K. B. 516.

maintainable in respect of so much of the damage to the road as was caused within the twelve months before the issue of the writ. Walton J., in contemplation of the possibility of our arriving at this decision, assessed the damage caused within that period at 150*l.*, and therefore there will be judgment for the plaintiffs for that amount.

BUCKLEY L.J. read the following judgment:—I am of the same opinion, and will add only a few words upon the construction of the Acts and their application to the facts of this case. First, as to s. 23 of the Act of 1878. The amended section runs, "from any person by or in consequence of whose order such weight or traffic has been conducted." These words do not, I think, mean necessary consequence, but mean consequence in fact naturally resulting from the order. The damage to this road did result, I think, in consequence of the defendants' order in the sense that if their order had not been given the damage in question would not have resulted, and the damage was a natural consequence of their order. It follows, I think, that the defendants are liable. The construction of s. 12, sub-s. 1 (*b*), of the Act of 1898 is difficult. The conclusion at which I arrive is that the work there spoken of does not extend to such a thing as a contract for the supply of goods for a period of time or a contract of service, and that is enough for the decision of this case. The contract for the supply of material for a year is the only work that is in the present case said to extend over a long period. It is the year's currency of that contract that is relied upon as constituting the long period. I desire to add, however, that, as at present advised, I think the word "work" here means a work of construction or of demolition or the like, something ejusdem generis with a building contract. The context is "any particular building contract or work." The words "building contract" plainly do not mean the building, the fabric, the thing constructed, but the contract under which the construction is made. The word "work" means, I think, not the railway embankment, or reservoir, or construction made, but the operation by which some construction is achieved. If the building owner is erecting a building not by contract, but on his own account, his operation will be work. If he does it by a

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contractor that will be work. The expression "works contract" is a familiar one. The word "work' here is, I think, used in the sense which it would bear in the expression "works contract." The word, I think, will cover any operation similar to that which may be the subject of a building contract. The contract in the present case was one for supply of materials for a definite time to be delivered at a definite place as ordered. This was not, in my opinion, "work extending over a long period" within the meaning of this sub-section. The words in this sub-section, "is the consequence of," do not, I think, mean "is the necessary consequence of," but mean a damage "which would not have occurred in the absence of" the particular building contract or work. To summarize what I have said, I read the words "the damage is the consequence of any particular building contract or work" as meaning "the damage is one which would not have occurred if a particular building contract or some work ejusdem generis, such as a work of construction or demolition, had not been entered into or effected and which was a natural consequence of that building contract or work." If that be the true meaning of the words, the contract here in question did not constitute "work extending over a long period." The result is that the six months clause does not apply, and that the plaintiffs can recover only for expenses incurred within the twelve months mentioned in the first part of the sub-section. This gives August 22, 1904, as the date as from which the damage is to be ascertained.

KENNEDY L.J. I desire not to give a final opinion as to the true construction of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, as applicable to all cases, but to confine myself as far as possible to the particular case now before us. The words in question, "where the damage is the consequence of any particular building contract or work extending over a long period," have to be carefully scrutinized. First of all, the damage is not that which is done by any particular contractor or person doing work, but is "the consequence of any particular building contract or work"; and I think that Buckley L.J. has just expressed better than I could what is the meaning of the words "the consequence." They do not mean "the necessary consequence"; I should be inclined

to go further and say they do not mean the natural consequence. They mean something which, as he said, would not have occurred in the absence of the contract or work. As Channell J. pointed out in the case of *Egham Rural District Council* v. *Gordon* (1), and as, no doubt, was the view of the whole Court in that case, it is a question of fact whether the damage which has happened is a natural consequence of the contract—something which would not have happened but for the contract. In the present case the facts are clear one way, as in the *Egham Case* (1) they were clear the other way. But that leaves unsettled the point upon which I desire to express no final opinion whether the words "building contract" or "work extending over a long period" refer to a contract or a work which is done by the employers of the haulier (i.e., the person who does the haulage), and to which the haulage which causes the damage is subsidiary; or whether they mean the contract which the employers make with the haulier who, in fulfilment of that contract, does the damage. Now my brother Walton has taken the latter view, and I am bound to say that, if I read correctly the judgments as reported in *Kent County Council* v. *Folkestone Corporation* (2), there is a good deal to be found there which supports that view. Undoubtedly Romer L.J. and Stirling L.J. do speak of the "work" (which is put by the reporter, no doubt correctly, in inverted commas, meaning the work referred to in this sub-section) as the work done by the haulier in bringing the loaded trucks which did the damage. Romer L.J. says (3): "I think the real "work" was that which was being done by the contractors under the separate contract between them and the defendant corporation, in pursuance of which the haulage occurred which caused the damage to the plaintiffs' highways. I think that was a separate work. It was that work, and that work alone, which necessitated the haulage which caused the damage." With great respect I am a little puzzled at the words "the work which necessitated the haulage," because in the previous sentence the work is described as the work which was being done by the

(1) [1902] 2 K. B. 120. (2) [1905] 1 K. B. 620.
(3) Ibid. at p. 634.

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contractors under a separate contract for haulage. However, the general drift of what was said by the Lord Justice seems to indicate that it was rather his opinion that, in some cases at any rate, the "work" mentioned in the sub-section might be construed as meaning the work provided for by the contract between the persons who are engaged in the building or other work and the person who does the hauling for them. Stirling L.J. says (1): "In my judgment, however, the work of which the damage was the consequence was not that scheme of improvement, but was the work done in pursuance of the contract with the contractors for the supply of the stone"; and at the conclusion he says: "I think, therefore, that the defendants have not shewn a good defence as regards the damage which was done during the period between February 11, 1903, and March 31, 1903, when the contract for hauling stone expired." In view of those judgments of members of the Court of Appeal, I desire not to express a final conclusion as to whether there may not be cases in which the "work" referred to in this sub-section may be treated not as the work for which material was required for the employers, but the work which the person who does the haulage contracted to do for the purposes of the work which those who engaged him wished to effect or create. It may become necessary in some future case definitely to decide what in this respect is the true construction. My present inclination is to say that in the language of this sub-section the Legislature intended to refer by the word "work" to something being done by the person sued who has entered, for the purposes of that work, into engagements which as a consequence, in the sense explained by Buckley L.J., bring traffic of excessive weight or extraordinary character over the roads which are thereby damaged.

I now come to the facts of the present case. Here we have to deal with a contract to supply and deliver to the corporation for twelve months stone of a particular kind. There is nothing more definite than that. In fact the stone was wanted by the corporation, not for any one purpose or for any one work; it was wanted for their general purposes, namely, for the maintenance and repair of various roads within their district. Therefore,

(1) [1905] 1 K. B. 620, at p. 635.

so far as they were concerned, there was no "work" in the sense of there being a unity of work. There was nothing which could be said to be a "work extending over a long period," whether or not you read the epithet "particular" in connection with the word "work." The stone was wanted by the corporation merely for the purpose of carrying out the duties which year by year they have to perform in the making-up or repair of roads within their district. They might have used that stone for any other purpose; the contract which they made with these contractors would have been equally fulfilled if they had chosen merely to store up the stone when it was delivered to them. It is true that the contracts for the delivery of the stones were to be performed within a certain period, but, in my opinion, the mere fact of there being a contract with such a time limit does not constitute a "work extending over a long period." Supposing a case in which the corporation bound themselves with certain contractors to take, say, some sort of building material for a period of five years. Could it be said that was a "work" on the part of the contractors going on all that time? It seems to me that all that could be said would be that there was an obligation on the contractors to supply the material over that period; and it is impossible to suppose that the Legislature intended that the road authority could claim a right to postpone an action for the recovery of expenses for damage from extraordinary traffic for six months after the completion of the five years. At the same time I do not wish to be taken to be expressing an opinion that the word "work" in this sub-section is to be treated as necessarily meaning constructive or destructive work. Cases occur to my mind of work neither constructive nor destructive which might well be argued to be within the sub-section. Take, for example, a case where a man makes contracts in order to bring a certain quantity of timber from a given area of woodland for a certain period. That would not be strictly, at any rate, a work either of construction or destruction, but I do not wish to say that that might not be treated as "work." Take, again, the case, which I believe is not uncommon in some parts of the country, of a contract to quarry a certain amount of stone from a specified quarry

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within a certain time. That, again, would not be a case of constructive or destructive work, but I should be sorry to say that a definite contract to work out a specified quarry and deliver the stone at a certain spot, as distinct from a contract merely for the supply of a certain quantity of stone, might not be fairly considered to be "work" within this sub-section. In the present case I think that we may decide upon the facts without attempting to give a final or complete interpretation of the sub-section upon the debateable points to which I have referred. The judgments delivered in *Kent County Council* v. *Folkestone Corporation* (1) must be read with reference to the particular question in that case. It was plain that the widening of the road by the corporation could not be the work from the completion of which the six months was to be calculated, because that work was continued wholly apart from the contract for the haulage of the stone, and went on for a considerable time after the haulage contract was completed. Therefore the only way in which the plaintiffs could succeed was by treating the work of haulage as the "work" within the sub-section. In the present case, whether the word "work" in the sub-section is to be regarded as referring to work done by the corporation which made arrangements for haulage with the view of carrying out that work, or whether it is to be regarded as the work of the contractors under their arrangement with the corporation, the plaintiffs' case must fail, because in neither alternative was there a "work" within the sub-section. There was no definite work of the corporation, who simply intended to use the stone wherever they might want to use it. There was no definite work of the contractors, who merely bound themselves to supply stone for a certain period. I suppose that the central idea of the Legislature was that, in a case where the damage to the road might be treated as really continuous so that, in analogy to common law principles, it might well be said that time ought not to begin to run until the doing of the damage came to an end, it would be fair to give the highway authority the opportunity of acting in what might be considered a reasonable way, and of waiting for six months after the date at

(1) [1905] 1 K. B. 620.

which the entire damage had been done before making any claim for damages, the object being to avoid the necessity of the highway authority making claims from time to time for temporary repairs.

In the result, without committing myself to any final opinion as to whether or not, in construing this sub-section, the work of the contractor or the work of the person employing him is to be considered, or as to whether the epithet "particular" is to be applied to the word "work," I am of opinion that in the present case there was neither a "building contract" nor a "work extending over a long period" within the sub-section.

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Appeal allowed.

Solicitors for plaintiffs: *May, Sykes & Co.*

Solicitors for defendants: *Smith, Rundell & Dods, for F. C. Lloyd, Croydon.*

A. P. P. K.

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Highway — Licence to Surveyor to take Materials from enclosed Lands for Repair of Highways—Excepted Lands—Jurisdiction of Justices—Time for which Licence may be granted—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 53, 54.

By the joint effect of ss. 53 and 54 of the Highway Act, 1835, the justices may license the surveyor of highways to take materials for the repair of the highways "at such time or times as to such justices shall seem proper" from the enclosed lands of any person, "such lands . . . not being a . . . . park."

On an application by a surveyor of highways for a licence under those sections the justices made an order authorizing him to take materials for a period of five years from certain enclosed land which in the opinion of the High Court was a park:—

Held—(1.) that the question whether the land was a park or not was one which was preliminary to the exercise of the jurisdiction given by the statute, and that the justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter;

(2.) That a licence, to be valid, must not purport to operate for a longer

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period than is necessary for the execution of the repairs, and that the licence, being for a period of five years without reference to the necessities existing at the date of its grant, was bad.

CERTIORARI to bring up an order of justices.

On October 2, 1906, an application was made on behalf of the Newton Abbot Rural District Council to the justices of the Newton Abbot petty sessional division for a licence under ss. 53 and 54 of the Highway Act, 1835 (1), authorizing them by their surveyor to take materials for the repair of the highways in the parish of Abbotskerswell from a place known as Grange Quarry, in the said parish. The quarry in question stood in certain enclosed land of about five acres in extent, which formed part of a permanent pasture field of thirty acres surrounding the residence of a Mrs. Hare, known as Grange Court. This field was planted with fruit and other ornamental trees, and was kept solely for the purpose of enhancing the amenities of the house. The carriage drives, which led through it to the house from lodge gates upon the highways, were unfenced. The portion of the field in which the quarry stood had at one time been occupied with the house, but at the time of the application was let to a farmer for grazing purposes as part of his farm, and in the hands of the tenant it was rated to the poor rate as agricultural land. There were no common or unenclosed lands in the parish from which materials could be taken for the roads, and Grange Quarry was the only one in the parish which was practically available for the purpose. The roads had been much damaged by traffic in connection with the construction of some waterworks in the neighbourhood. The justices found that the repairs contemplated

(1) By s. 53 of the Highway Act, 1835, the "justices shall, if they think proper, authorize" the surveyor of highways "to dig, get, gather, take and carry away such materials at such time or times as to such justices shall seem proper" from private enclosed lands for the purpose of the repair of the highways. By s. 54: "It shall be lawful for every such surveyor for the use aforesaid, by licence in writing from the justices at a special sessions for the highways, to search for, dig and get materials . . . . in or through any of the several or enclosed lands or grounds of any person whomsoever (such lands or grounds not being a garden, yard, avenue to a house, lawn, park, paddock, or enclosed plantation)."

at the date of the application "would take some time to complete," and the highway surveyor to the district council, in an affidavit made eight months after the application, said that the repairs which were contemplated when the application was made were in progress and would continue for three or four years more. The justices also found that the five-acre enclosure in which the quarry stood was not a park, and they granted the application, the order being addressed, "To the surveyor of the Newton Abbot Rural District Council"; and concluded, "Therefore we do hereby give our licence to the said surveyor to dig, get and carry away the same for the period of five years, the said surveyor making satisfaction for the same."

A rule was obtained on behalf of Mrs. Hare for a certiorari to bring up the order to be quashed upon the three following grounds: (1.) That it was made in respect of land which was a park; (2.) that it was made for a period of five years; (3.) that the licence was granted, not to the rural district council, but to their surveyor.

Macmorran, K.C., and *W. Mackenzie*, for the district council, shewed cause. The first ground on which the rule was moved, that the place to which the licence referred was a park, is not open, for the justices decided the point in the council's favour, and their decision, being upon a question of fact, is not open to review. There was abundant evidence upon which they could decide as they did, for the piece of land in which the quarry stood was let as grazing land to a farmer and was necessarily fenced off and detached from the park of which it had formerly formed part. And the justices had jurisdiction to decide the question, for it was absolutely necessary that they should do so. Though the proviso that the land from which the surveyor may take materials shall not be a park occurs in s. 54, it must be read as if it stood by itself as a special clause: *Alresford Rural Sanitary Authority* v. *Scott* (1); and consequently it applies to the licence under s. 53. Whether particular land is a park or not is a question of fact which must be finally decided by some tribunal or other, and it was probably intended by the Act that the local

(1) (1881) 7 Q. B. D. 210, at p. 213.

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justices, who presumably would be well acquainted with the spot, should be that tribunal, rather than another Court which was not so acquainted. In *Williams* v. *Adams* (1) it was held, under s. 73 of the Highway Act, 1835, which provides that if any matter be put on a highway so as to be a nuisance the surveyor may by order of a justice remove it, that the justices had jurisdiction to say whether the locus in quo was a highway or not. And similarly in *Reg.* v. *Young* (2), where a local Act gave jurisdiction to deal with the offence of laying materials in a street, and the person charged maintained that the spot where the materials complained of were laid was his own private property free from any right of way, it was held that the justices had power to determine whether it was a street or not.

The second objection to the licence, that it was to enure for five years, must also fail. The other side will rely upon the case of *Earl Manvers* v. *Bartholomew* (3), where the licence was in the form given in the schedule to the Act and was silent as to the time for which it lasted. It was there held that it did not continue for an indefinite period, but was limited to the necessities of the particular occasion in respect of which it was granted. But it is so limited here. The evidence was that the repairs, which were considerable, would take upwards of four years to execute, and the justices, in granting the licence for five years, therein allowing a few months' margin for error in calculation, intended it to be limited to the repairs which were then necessary at the time of the licence granted. In the above-mentioned case the language of Mellor J. suggested that such a licence as that in the present case would be good. He said: "I do not say that the licence must necessarily be given year by year, or for any particular time, but I think it cannot be looked upon as absolutely indefinite. It must have some reasonable limits, with reference to the particular circumstances of the existing necessity, to provide for which it was given."

The remaining objection, that the licence was granted to the wrong person, it may be admitted, would be fatal if it were not for the Court's power of amendment. It is conceded that by the

(1) (1862) 2 B. & S. 312. (2) (1883) 52 L. J. (M.C.) 55.
(3) (1878) 4 Q. B. D. 5.

combined effect of s. 25 of the Local Government Act, 1894, and s. 144 of the Public Health Act, 1875, the rural district council is in a rural district the surveyor of highways, and the licence should have been granted to the council, as was asked in the application, which was in proper form. But the mistake in drawing up the justices' order was a mere mistake in form, which is curable by amendment under s. 7 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

Foote, *K.C.*, and *Simey*, in support of the rule. The question whether the land in question is a park or not is no doubt a question of fact, but it is a question of fact of such a kind that the justices cannot by deciding it wrongly give themselves jurisdiction. The limits of the finality of the justices' decision upon questions of fact was thus laid down by Coleridge J. delivering the judgment of the Court of Exchequer Chamber in *Bunbury* v. *Fuller* (1): "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the Superior Court. Then, to take the simplest case—suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits. On its being presented, the judge must not immediately forbear to proceed, but must inquire into that preliminary fact and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error on this, the Court of Queen's Bench will issue its mandamus or prohibition to correct

(1) (1853) 23 L. J. (Ex.) 29, at p. 35.

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his mistake." The question of park or no park is collateral to the merits, and the decision upon it is preliminary to the exercise of the jurisdiction given by the section. The decision, therefore, is open to review upon certiorari. Upon the evidence it appears that the land was in fact part of the park. Moreover, the word "park" occurs in the section as an exception, and the onus is consequently on the council to shew that it is not a park. A portion of a park may be temporarily severed from the residue and let for grazing purposes without its ceasing to be part of the park. And the fact that it was rated in the farmer's hands as agricultural land at the lower rate provided by the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), does not affect the question, for the definition of agricultural land in that Act only excludes a park when occupied together with a house, which here it was not.

Upon the point that the licence was for a period of five years the case of *Earl Manvers* v. *Bartholomew* (1) is directly against the district council's contention. It was there laid down that "the licence is to be pro re nata, and must be limited to the necessities of the occasion." And there was no evidence here that the repairs were expected to take five years, and still less that they could not possibly be done in a shorter time. The surveyor might get all the roads repaired in two years, and yet the licence would authorize him to continue taking stone for three more.

The third objection, that the licence was given to the wrong person, is also well founded. The mistake is one of substance, not of form, and therefore is not capable of amendment under the Quarter Sessions Act, 1849. The justices no doubt meant to give the licence to the proper person, but they made a mistake as to who the proper person was. They were misled by the fact that the person to whom they granted the licence was styled the highway surveyor to the district council, and they meant to grant it to him thinking that he was the surveyor of highways within the meaning of the Highway Act. The departure from the statutory form was deliberate and not a slip, and cannot now be amended.

CHANNELL J. The question in this case arises upon a rule for a certiorari to bring up an order of justices authorizing the

(1) 4 Q. B. D. 5.

entry upon certain enclosed land for the purpose of taking materials for the repair of certain roads. To that order three objections were taken. I think it convenient to deal first with the one which goes to the merits of the matter, namely, that, the land in question being a park, the justices had no jurisdiction to make the order. That turns upon the construction to be put on ss. 53 and 54 of the Highway Act, 1835, and it is upon that construction that the only difficulty in the case arises, because, in my view, the rule as to how far a Court of limited jurisdiction can give itself jurisdiction by an erroneous decision upon a question of fact is perfectly well settled; but there is often a difficulty in applying that rule to the particular case before the Court. It is clear upon the authorities that such a tribunal cannot give itself jurisdiction by wrongly deciding a question of fact which arises as a preliminary question before it begins to exercise its jurisdiction. But the difficulty is to ascertain whether the particular question is a preliminary one, or whether in deciding it the justices are in fact exercising the jurisdiction given to them by the statute. What we have to determine is what it is that the statute here gives the justices jurisdiction to consider. Now the two sections of the Highway Act to which I have referred, ss. 53 and 54, are extremely difficult to understand, and I must confess I am still in some doubt as to what, if any, is the difference in the subject-matter of those two sections. By the former section the justices are empowered to license the surveyor of highways to enter enclosed land and for the purposes of the repair of the highways "to gather, take and carry away such materials at such times as to such justices shall seem proper." That section contains no limitation of the kind of enclosed land from which the materials may be taken. The provision that it shall not be a park is contained in s. 54. That section provides that "It shall be lawful for every such surveyor for the use aforesaid, by licence in writing from the justices, to . . . . get materials . . . . in . . . . any of the several or enclosed lands or grounds of any person whomsoever (such lands or grounds not being a . . . . park)." The limitation comes in as a qualification of what the surveyor may do, but I think the licence there referred to is the licence dealt with in s. 53, and

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that the two sections must be read together; with the result that there is power given to the justices to authorize the surveyor to get materials in enclosed lands which are not a park, but no power to authorize him to get materials from a place which is a park. In my opinion the question whether a place is a park or not is a matter which is preliminary to the exercise of the justices' jurisdiction, and one which it is not for the justices to finally determine. And if the place is a park in fact, they cannot give themselves jurisdiction by finding that it is not a park. That being so, the question remains whether the land in which the quarry is situate is in fact a park or not, and from the physical description that has been given of it I think we are bound to come to the conclusion that it is a park.

The second objection to the justices' order was that they had no power to grant the licence for a period of five years. The case of *Earl Manvers* v. *Bartholomew* (1) is an authority that it must be "coextensive with the existing necessity for materials with reference to which the application for the licence is made." It must not operate for a longer period. If the justices here had so limited it in express words I do not think it would have made their order bad, nor would it have been bad if they had added to it that the period of its operation should not exceed one year, or such other time as might be absolutely necessary for the execution of the work. But here they have said that it is to last for five years without reference to the necessities of the case, and in that time circumstances may be materially altered. They no doubt made their order on the footing that the repairs then necessary would approximately take five years to execute. But it might well happen that some one might indict the parish or district council for non-repair, and that they might be compelled to do the work very much quicker, in which event they would have the whole of the residue of the five years in which to take materials for new requirements not the proper subject of the justices' licence.

The last point was that the order was wrong because it purported to authorize the surveyor to the rural district

(1) 4 Q. B. D. 5.

council to do the work instead of authorizing the rural district council itself. As to that I have the strongest opinion that the mistake is one which comes within the power of amendment given by Baines's Act, and I think it would be mischievous if we suggested that there was any doubt upon such a point. It is not as if the justices were authorizing a wholly different person. It was intended to authorize the surveyor to the district council in his capacity as surveyor to the district council. They ought to have authorized the master instead of the servant who would in fact do the work. The mistake in giving the authority to the servant is clearly amendable, and if that were the only objection I think the rule should be discharged. But upon the other two grounds upon which the rule was moved it must be made absolute.

BRAY J. I am of the same opinion. Upon the first point the question is whether it was intended by the statute that the justices should have jurisdiction to license the surveyor to get materials from a park. If it was not, then the justices could not give themselves jurisdiction by finding that the place in question was not a park. But s. 54 expressly says that the surveyor may by licence from the justices get materials from enclosed lands, "such lands . . . . not being . . . . a park." Therefore the justices must first of all inquire whether the place is a park or not. But that inquiry is not in the course of the exercise of the jurisdiction, but as a preliminary to it. The case, therefore, falls within the rule laid down in *Bunbury* v. *Fuller* (1), and the justices' decision upon the matter is subject to review. That being so, I agree with Channell J. that upon the evidence we ought to find that the place was in fact a park. Then as to the next point, that the licence was for five years. It has been decided that the justices have no power to make an order except with reference to the particular repairs which were necessary at the date of the order. Here the order in fact purports to give a licence to take materials for any repairs that may become necessary in the course of the next five years, although the surveyor

(1) 23 L. J. (Ex.) 29.

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may have already taken what was necessary for the contemplated repairs. Therefore on that point also the order was bad.

SUTTON J. I have nothing to add.

Rule absolute for certiorari.

Solicitors for the landowner: *Mann & Crimp, for Hacker, Michelmore & Wilkinson, Newton Abbot.*

Solicitors for the district council: *Church, Rendell & Co., for Baker, Watts, Alsop & Woollcombe, Newton Abbot.*

J. F. C.

1907
Dec. 13.

THE KING *v.* JUSTICES OF SURREY.

Highway — Diversion—Sufficiency of Plan — Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 85.

On proceedings being taken under s. 85 of the Highway Act, 1835, for the diversion of a highway, the justices certified that the proposed new highway would be more commodious to the public. The plan which it was proposed to enrol together with that certificate consisted of a sheet of the twenty-five inch Ordnance Survey map, upon which the lines of the old and new highways were marked in colours and the width of the new highway was stated in writing, but the lengths of the old and new highways were not so stated:—

Held—(1.) that the plan did not sufficiently "describe the old and proposed new highways by admeasurement thereof," and that the quarter sessions were consequently right in refusing to enrol the certificate; (2.) that, even if they had been wrong, mandamus would not lie under the circumstances to compel them to enrol it.

MANDAMUS to quarter sessions to enrol a certificate of justices for the diversion of a highway.

In February, 1907, proceedings were taken by Mr. H. F. Locke King, under s. 85 of the Highway Act, 1835, for the diversion of a certain highway situate in the parishes of Byfleet and Chertsey, in the county of Surrey.

On March 6, at a meeting of the Byfleet Parish Council, a resolution was passed agreeing to the diversion.

On April 6 two justices viewed the old and proposed new

highways; and on May 11 they issued their certificate that the old highway as diverted would be more commodious to the public.

On June 4, at a meeting of the Byfleet Parish Council, the resolution of March 6 was duly confirmed.

The plan, which in accordance with the requirements of s. 85 of the Highway Act was delivered to the justices previously to the issue of their certificate, and was afterwards tendered for enrolment at the quarter sessions, consisted of a sheet of the Ordnance Survey map of the district, with a scale printed on it shewing that it was drawn on the scale of twenty-five inches to the mile. Upon this map the lines of the old and proposed new highways were indicated in colours, and it was stated in writing that the proposed new highway would be five feet in width, but the lengths of the old and proposed new highways were not so stated on the map. No appeal against the certificate was brought under s. 88, but on application being made to the quarter sessions to enrol the certificate the justices refused to do so, upon the grounds that: (1.) The consent of the parish council of Byfleet required by s. 13 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), was a condition precedent to the issue by the viewing justices of their certificate; (2.) the plan delivered to the justices did not "particularly describe the old and proposed new highway by metes bounds and admeasurement thereof," as required by s. 85 of the Highway Act, 1835.

A rule having been obtained for a mandamus to the quarter sessions to enrol the certificate,

Ernest Jelf, for the justices, shewed cause. The justices had jurisdiction to examine into the sufficiency of the certificate and plan, and, as they have exercised that jurisdiction, no mandamus will lie even if they have come to a wrong conclusion: *Reg.* v. *Justices of Worcestershire*. (1) Coleridge J., delivering the judgment of the Court there, said: "It is the duty of the sessions, where there is no appeal, to be satisfied that the certificate came before them correct on its face, and accompanied by plan and proof, such as the statute requires. . . . . It must be trusted to

(1) (1854) 3 E. & B. 477.

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the Court to determine what apparent defects are merely formal and no grievance, and what are substantial." But, further, the decision of the justices was right. Sect. 85 of the Highway Act, 1835, provides that there is to be delivered to the justices viewing the highway, and subsequently enrolled together with their certificate, "a plan . . . . particularly describing the old and the proposed new highway by metes bounds and admeasurement thereof." It is of vital importance that the plan should be sufficient in those respects. In *Reg.* v. *Newmarket Ry. Co.* (1) Patteson J. says that upon the diversion of a road the interests of the public are safeguarded by various requirements, "and, above all, by a plan verified and annexed to the certificate 'particularly describing the old and proposed new highway by metes, bounds, and admeasurement' . . . . so that every person interested may know exactly to an inch what is the new line of road which the public is to acquire in substitution for the road taken away; and by reference to the certificate and plan be able to ascertain afterwards whether that line has been secured to it." Here there is no statement on the plan of the lengths of either the old or the new roads. The exact length of both ought to be stated in writing on the plan. Here they are not so stated; and it is not enough that the plan is drawn to scale. An objector ought not to be required to bring dividers with him when he wishes to examine the plan; and, even if he did, he could only ascertain the lengths approximately, and not with any degree of accuracy.

[He was stopped by the Court.]

Macmorran, K.C., and *Guy Lushington*, in support of the rule. The plan sufficiently complies with the statute. Any person who wishes to ascertain the lengths for himself can do so by reference to the scale on the plan.

CHANNELL J. We are of opinion that this rule must be discharged. There is no power in the magistrates or in this Court to alter any of the terms of the statute, or to say that anything that the statute requires, however technical it may be, is unnecessary. What the statute requires is "a plan . . . . particularly describing the old and the proposed new highway by metes,

(1) (1850) 15 Q. B. 702.

bounds and admeasurement thereof." That expression "admeasurement" means that the lengths of the two highways must be stated in writing on the plan. Perhaps it might be enough if the lengths of the two ways were stated in another document deposited with the plan and referred to in it. But there is nothing of that kind here. The metes and bounds of the highways are no doubt given, but there is nothing in the nature of admeasurement. The only way in which a person consulting the plan could arrive at the lengths of the respective ways would be by measuring the lines representing the highways and comparing the results with the scale. But that would involve a calculation which a member of the public desirous of ascertaining the relative lengths of the old and new highways ought not to be required to undertake. In my opinion the magistrates were right in refusing to enrol the certificate. Moreover, the question whether the certificate and plan, which they are asked to enrol, comply with the requirements of the section is a matter which the magistrates have to inquire into. And therefore, even if in our opinion they had been wrong, the case would not be one for a mandamus.

Bray J. I am of the same opinion. I do not think that this plan complied with the provisions of the Act, for it failed to describe the old and new highways by admeasurement. It has been suggested that it is not usual to do so in writing upon the plan. But my experience is that it has been customary to state on the plan that the distance from A. to B., the termini of the old highway, is so much, and from C. to D., the termini of the new highway, so much.

Sutton J. I agree.

Rule discharged.

Solicitors for prosecutor: *Metcalfe, Birkett, & Rowlatt, for Paine, Brettell & Porter, Chertsey.*

Solicitors for justices: *Philbrick & Co., for Weeding, Kingston-on-Thames.*

J. F. C.

1907
April 16.

HASTINGS CORPORATION *v.* LETTON AND ANOTHER. (1)

Corporation — Dissolution — Bona vacantia — Chattels Real — Landlord and Tenant — Lease — Limited Company Lessees — Sureties for Payment of Rent during the Term — Dissolution of Company — Reverter to Lessor — Acceleration of Reversion — Determination of Term — Liability of Sureties.

A lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the lease. On dissolution of the corporation the lease does not vest in the Crown as bona vacantia, but the reversion is accelerated and the land reverts to the lessor.

Therefore, where a lease was made to a limited company and payment of the rent during the term was guaranteed by sureties, on dissolution of the company under ss. 142 and 143 of the Companies Act, 1862:—

Held, that the lease, not having been assigned, had determined, and with it the liability of the sureties.

APPEAL from the county court of Sussex holden at Hastings.

The action was brought to recover a sum of 20*l.* 3*s.* 8*d.* for rent alleged to be due on September 17, 1906, under a lease dated July 17, 1903, whereby the plaintiffs demised certain premises in Hastings to a limited company named the South Coast Fruit and Potato Company, Limited, for a term of seven years from July 17, 1903, at the yearly rent of 200*l.* by twelve equal payments on the 17th day of every calendar month.

The lease was made between the plaintiffs, thereinafter called the lessors, of the first part, the South Coast Fruit and Potato Company, Limited, thereinafter called the lessees, of the second part, and the defendants, thereinafter called the sureties, of the third part, and contained the following covenant: "The lessees and the sureties do hereby for themselves and as separate covenants also the lessees do and each of the sureties doth for himself covenant with the lessors that the lessees and sureties or some or one of them will during the said term pay the said rent on the days and in manner hereinbefore mentioned." The lease also contained the following proviso: "Provided always that although as between the lessees and the sureties the sureties are sureties only for the lessees yet as between the sureties and

(1) The report of this case has been delayed pending an appeal, at first intended but afterwards abandoned, to the Court of Appeal.—W. H. G.

the lessors the sureties are to be considered as principals so that they or their heirs executors administrators or assigns shall not be released or exonerated by any matter or thing whatsoever whereby they as sureties only would be so released or exonerated."

The lease also contained a covenant by the lessees not to assign the premises without the consent in writing of the lessors, which, however, was not to be improperly withheld.

In pursuance of a licence in writing dated February 3, 1904, under the common seal of the plaintiffs, a deed of assignment was on February 8, 1904, executed between the South Coast Fruit and Potato Company, Limited in liquidation, thereinafter called the company, of the first part, one Isaac Ebenezer Mannington, thereinafter called the vendor, of the second part, the defendants, thereinafter called the mortgagees, of the third part, and the Southern Produce Company, Limited, thereinafter called the purchasers, of the fourth part. This deed recited that the company, i.e., the South Coast Fruit and Potato Company, had issued debentures charging its undertaking and all its property, present and future, with the repayment of the amount owing on twenty debentures of 50*l.* each; that those debentures contained a power to the majority in value of the debenture-holders, in the event of an effective resolution being passed for the winding-up of the company, to appoint a receiver who should have power to take possession of the property charged, and to sell, or concur in selling, any of such property; that by an indenture dated November 9, 1903, and made between the company of the one part and the mortgagees, i.e., the defendants, of the other part, the undertaking of the company was charged with the repayment to the defendants of certain moneys as therein mentioned; that the premises demised by the lease of July 17, 1903, were specifically charged with the repayment of such moneys, and that the said indenture of November 9, 1903, gave to the defendants a power of sale which had become exercisable; that at an extraordinary meeting of the shareholders of the company on November 30, 1903, an extraordinary resolution was passed that the company should be wound up voluntarily, and that the said Isaac Ebenezer Mannington should be appointed

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liquidator; and that the majority in value of the debenture-holders had appointed the vendor, i.e., the said Isaac Ebenezer Mannington, receiver for the debenture-holders. It was then witnessed that, in consideration of 5*l.* paid by the purchasers to the vendor, the vendor as trustee assigned, and the company assigned and confirmed, and the defendants as mortgagees assigned to the purchasers, all the hereditaments and premises comprised in and demised by the lease of July 17, 1903, to hold the same unto the purchasers for the residue of the term of seven years thereby granted, subject to the payment of the rent and the performance and observance of the covenants on the part of the lessees and conditions by and in the said lease reserved and contained. And the purchasers covenanted with the vendor and separately with the company, and as a separate covenant with the mortgagees, that they would thenceforward during the continuance of the term pay the rent reserved by and perform and observe the covenants and agreements on the part of the lessees and the conditions contained in the said lease, and would at all times keep the vendor and the company and the mortgagees effectually indemnified against all actions by reason of the non-payment of the rent or the breach of any of the covenants, agreements, or conditions.

Both companies were subsequently wound up voluntarily, and the statutory returns required by ss. 142 and 143 of the Companies Act, 1862 (25 & 26 Vict. c. 89), to be made in such cases to the Registrar of Joint Stock Companies were duly registered, in the case of the South Coast Fruit and Potato Company, on October 23, 1905, and in the case of the Southern Produce Company on May 9, 1906, and on January 23, 1906, the former company and on August 9, 1906, the latter company was dissolved.

On August 9, 1906, the solicitors acting for the liquidator of the Southern Produce Company wrote to the town clerk of the plaintiffs announcing the dissolution of that company and enclosing the rent due down to that date. Nothing further happened until September 17, when the plaintiffs demanded a month's rent as due on that day from the defendants.

The defendants repudiated liability, on the ground that the

lease of July 17, 1903, and with it their liability, came to an end on the dissolution of the Southern Produce Company on August 9, 1906.

The plaintiffs brought an action in the Hastings County Court for the month's rent due on September 17, 1906. The county court judge gave judgment for the plaintiffs, holding that the lease had not determined on the dissolution of the Southern Produce Company, but had vested in the Crown as bona vacantia; that the liability of the defendants endured so long as the lease endured; and that they still continued liable for the payment of the rent.

The defendants appealed.

E. E. Humphrys, for the defendants. On the dissolution of the Southern Produce Company there ceased to be any lessee. If there is no lessee there can be no lease; the reversion on the lease was accelerated on the dissolution of the company, just as it would be on the bankruptcy of the lessee and disclaimer by his trustee in bankruptcy. Then, the lease being determined, the liability of the defendants ceased: *Stacey* v. *Hill.* (1) On the dissolution of a corporation its lands and tenements revert to the grantor: Blackstone's Commentaries, 21st ed. vol. 1, p. 483 (marg. p. 484); Grant on Corporations, p. 303; Kyd on Corporations, vol. 2, p. 516. When a limited company, having contracted to sell property—for example a lease, as in *In re General Accident Assurance Corporation, Ld.* (2), or letters patent, as in *In re Taylor's Agreement Trusts* (3), or freeholds or copyholds as in *In re Richard Mills & Co.* (*Brierly Hill*), *Ld.* (4) —is dissolved after being paid the purchase-money, but before it has conveyed the property, the balance of authority is in favour of the view that a judge of the Chancery Division has power to make a vesting order under s. 35 of the Trustee Act, 1893, on the ground that the case is one in which the trustee for the purchaser "cannot be found." If, as the county court judge has held in the present case, the property in such cases vests in the Crown, it could not be said that the case is one

(1) [1901] 1 K. B. 660.
(2) [1904] 1 Ch. 147.
(3) [1904] 2 Ch. 737.
(4) [1905] W. N. 36.

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of a trustee who "cannot be found" within the meaning of that section, and then no such order could be made.

The plaintiffs might have kept the lease alive by applying in the winding-up that provision should be made for payment of the rent before the company was dissolved: *In re Haytor Granite Co.* (1)

Hohler, K.C., for the plaintiffs. The passage from Blackstone's Commentaries must refer only to grants in fee simple. As an authority for his proposition the learned author refers to Co. Litt. 13, where Lord Coke treats "Of Fee Simple." There can be no doubt that bona vacantia may include chattels real as well as personal: *Middleton* v. *Spicer* (2); *In re Higginson and Deane, Ex parte Attorney-General.* (3) In that case Wright J. said: "From the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (2), in 1783, it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of bona vacantia; and during all the period which has elapsed since that decision no exception from the rule seems to have been established." But if equitable estates vest in the Crown, notwithstanding the presence of a legal trustee interposed between the Crown and the object of the trust which has failed, a fortiori will legal estates so vest where, as here, both the legal and equitable interest fail and no one is interposed between the Crown and the bona vacantia. That the legal estate in leaseholds may vest in the Crown was assumed by Joyce J. in *Pryce-Jones* v. *Williams.* (4) In the case of *In re No. 9, Bomore Road* (5), where a limited company had agreed to transfer leaseholds to a new company, but was dissolved before any actual assignment had been executed, Warrington J., under s. 25 of the Trustee Act, 1893, appointed a new trustee for the new company and made an order vesting the legal estate in that trustee in trust for the new company. It follows that the dissolution of a company does not put an end to leases which it has assigned or agreed to assign. If the defendants had been called

(1) (1865) L. R. 1 Ch. 77.
(2) (1783) 1 Bro. C. C. 201.
(3) [1899] 1 Q. B. 325.
(4) [1902] 2 Ch. 517.
(5) [1906] 1 Ch. 359.

upon to pay and had paid this rent, they could have had the lease assigned to them; the lease must therefore be in existence, for its existence or non-existence cannot depend upon whether the defendants have or have not paid the rent to the plaintiffs.

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On the construction of this covenant the defendants continue liable for payment of the rent for the term of seven years notwithstanding the sooner determination of the lease, as in *In re Fitzgeorge, Ex parte Robson.* (1) [*Ex parte Walton, In re Levy* (2) and *Hill* v. *East and West India Dock Co.* (3) were also cited.]

Humphrys, in reply.

DARLING J. This case raises a difficult point which, apparently for the first time, it is necessary to decide. The corporation of the borough of Hastings granted a lease to a certain company, who covenanted in the lease to pay the rent thereby reserved for the term of seven years. The appellants entered into similar covenants as sureties. The company assigned the lease to another company, the Southern Produce Company, Limited, the appellants remaining sureties on the same terms for the new company; and the old company ultimately dissolved. The new company, the assignees of the lease, also dissolved, namely, in August, 1906, without having assigned over the lease; and the question is whether, the new company having become dissolved, the appellants are nevertheless still liable to pay the rent to the lessors. They undertook to pay the rent in these terms: "The lessees do, and each of the sureties doth for himself covenant that the lessees and sureties, or some or one of them, will during the said term pay the said rent on the dates and in the manner hereinbefore mentioned." The question is whether the term came to an end by the dissolution of the new company or whether it still exists, and, if it does still exist, whether the sureties are still bound to pay the rent although the lessees and their assignees are gone out of existence. The county court judge has held that the sureties are still bound to pay the rent, on the ground that the dissolution of a company is analogous to the

(1) [1905] 1 K. B. 462. (2) (1881) 17 Ch. D. 746.
(3) (1884) 9 App. Cas. 448.

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death of a human being; he argues that if a single human being were a lessee for a term of years and the payment of his rent were guaranteed by sureties, the sureties would continue liable for the rent during the term notwithstanding that the lessee himself had, during the term, died a bastard without issue and intestate. In such a case, the county court judge says with truth, the term would not be at an end, but would still subsist and vest in the Crown, and, the sureties having undertaken to pay the rent during the term, as long as the term subsisted the sureties would be liable for the rent. In my opinion this analogy, though specious, is false. The death of a limited company is in truth but a figurative expression: it is not the expression used in the Companies Act, 1862; the word used in that Act is not death, but dissolution. In the case of a company dissolution does not come upon it, as death does upon a human being, with all its contracts, liabilities and property still on its hands: the dissolution of a company is regulated by ss. 142 and 143 of the Companies Act, 1862, by which it is provided that before a company dissolves it shall have nothing; it must first be divested of everything, and is not permitted to dissolve until it is divested of everything. The analogy on which the county court judge has based his judgment takes no notice of these facts. A truer analogy, though not an exact one in all particulars, would be the case of a single human being lessee for life. On the death of such a lessee the land reverts to the lessor. The passage from Blackstone's Commentaries cited by counsel for the appellants is still good law. Part of it was cited by Wright J. in *In re Higginson and Dean* (1) as a perfectly accurate statement of the law in modern times. That passage is as follows: "But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation; which *may* endure for ever: but when

(1) [1899] 1 Q. B. 325.

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that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life." (1) The law there laid down seems to apply to the present case. I cannot see that when this company was dissolved there were any bona vacantia to vest in the Crown. The term determined and the land reverted to the grantor of the lease; the lease merged in his reversion, and he has his whole estate again. If further authority is wanted it will be found in *In re Higginson and Dean* (2), where Wright J., after quoting the opinion of Story J. in the cases of *Wood* v. *Dummer* (3) and *Mumma* v. *Potomac Co.* (4), said: "This statement of the law may not perhaps be entirely applicable in this country, but it requires consideration. It might be reasonable to enact"—I pause there to observe that the learned judge says "to enact," not "to hold" —"that, in analogy to the immemorial law of executors and administrators, and the statute of 31 Edw. 3, st. 1, c. 11, on the dissolution of a corporation aggregate all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds, or on claims in debt, devolve upon the Crown, subject to payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust." In the present case I think it would be judicial legislation to hold that the law as laid down by Sir W. Blackstone does not apply, and that when a company, being lessees or assignees of a term of years, ceases to exist, the term does not revert to the grantor.

For these reasons I think this appeal should be allowed.

PHILLIMORE J. I am of the same opinion. It is clear that the covenant of the defendants endures only so long as the term endures. The question is, Does the term still endure? Counsel for the plaintiffs say that it does, for the reasons given by the county court judge. They say there may be a lease without a leaseholder; but I do not see how that can be. A lease is a chattel real, a species of property, and there can be no property without some one to whom it is appropriate. Then they say

(1) 1 Bl. Com. 484.
(2) [1899] 1 Q. B. 325, at p. 332.
(3) (1824) 3 Mason, 308.
(4) (1834) 8 Peters, 281.

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that, if the existence of a leaseholder is necessary, a leaseholder does exist, namely, the Crown.

Now it is to be observed that if the lease is still in existence there ought never to have been a dissolution of the company, because, as pointed out by my brother Darling, a company must strip itself or be stripped of all its property and obligations three months before it ceases to exist. This point, therefore, ought never to have arisen; but granting that it does arise, and supposing that this corporation has succeeded in stepping out of existence without stripping itself of its property and obligations, why should its property vest in the Crown? The Crown is entitled to bona vacantia, and I quite agree that in the cases described by Wright J. in *In re Higginson and Dean* (1) there are bona vacantia which the Crown could claim; but it is clear from the judgment of Wright J., and from the argument on behalf of the Attorney-General, that the bona vacantia which came in question in that case were personal chattels held by some person as trustee for the extinct corporation; neither the counsel nor the learned judge had in mind the case of chattels real. In the case of personal chattels in the hands of a trustee for an extinct corporation it is very reasonable that there should be a vesting in the Crown: the trustee cannot hold them as beneficial owner; the body for whom he held them is extinct without successors or assigns, and the chattels remain without an owner. In these circumstances they vest in the Crown as bona vacantia. The case of *Pryce-Jones* v. *Williams* (2) was cited to us. As to that case, I desire to say that there is no authority that mere legal estates as such vest in the Crown as bona vacantia. The legal advisers of the Crown have on more than one occasion refused to admit any such vesting, as in *In re General Accident Assurance Corporation, Ld.* (3) and *In re Taylor's Agreement Trusts.* (4) That is the answer to what was said by Joyce J. in *Pryce-Jones* v. *Williams* (2) as to there being any power to compel the Crown to assign a legal estate which might have vested in the Crown. But estates and interests in land vested in a corporation do not vest in the Crown on

(1) [1899] 1 Q. B. 325.
(2) [1902] 2 Ch. 517.
(3) [1904] 1 Ch. 147, at p. 149.
(4) [1904] 2 Ch. 737, at p. 740.

dissolution of the corporation. It is familiar knowledge that estates and interests in land were often conferred upon and held by corporations, not only estates in fee simple, but also long leases, often with no covenants and at merely a nominal rent. In the one case the grantor conveyed the whole of his estate; in the other he carved out of his estate an interest which he conveyed to the corporation. In either case the law as stated by Blackstone applies; the property is given on the implied condition that it is to be held during the life of the corporation. Grant on Corporations agrees, and Kyd on Corporations substantially agrees, with that statement of the law; the grant being made to the corporation for beneficent purposes, when the corporation ceases the public spirit of the grantor is rewarded by the property reverting to him. There is no reason why any distinction should be made in this respect between estates for years and estates in fee simple; in either case it seems good sense that the land should revert to the grantor when the purpose for which the grant was made ceases to exist. So if property is given to a corporation for a term of years the term endures so long as the corporation is in existence to enjoy it; the reversion is accelerated if the corporation ceases to exist. Therefore the lease in this case ceased to exist when the lessees ceased to exist. The analogy between the dissolution of a corporation and the death of a natural human being is not a true analogy. On the death of a human being his personal representatives arise and take possession of his estate. It is only in the case of a corporation that the present state of things can occur. A corporation has no personal representatives, and when it is dissolved its lands revert to the grantors. For these reasons I am of opinion that the liability of the defendants ceased, because the term had ceased, on the dissolution of the company.

Appeal allowed. Leave to appeal granted. (1)

Solicitors for appellants: *Gibson & Weldon, for Meadows, Thorpe & Menneer, St. Leonards.*

Solicitors for respondents: *Lydall & Sons, for B. F. Meadows, Hastings.*

(1) The intended appeal was not pursued.

W. H. G.

C. A.
1907
Dec. 2, 3, 20.

[IN THE COURT OF APPEAL.]

ELLIS *v.* GLOVER & HOBSON, LIMITED.

Mortgage—Trade Fixtures—Hire and Purchase Agreement—Right of Mortgagee against Owner of Fixtures—Mortgagor in Possession.

In the absence of express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises provided they are removed before the mortgagee takes possession, but this right of removal ceases when possession is taken by the mortgagee.

In November, 1902, a freehold laundry was mortgaged in the usual form for 400*l.*, the mortgagor covenanting not to remove any fixtures without the written consent of the mortgagee. In June, 1903, trade machinery was fixed up in the premises under a hire and purchase agreement, which provided that it should not become the property of the hirer until all instalments had been paid, and should be removable by the owner on the failure of the hirer to pay any instalment. Default having been made in payment of an instalment, the owner entered and removed the machinery. In an action by the mortgagee against the owner of the machinery for wrongful removal:—

Held (reversing the decision of Phillimore J.), that the machinery passed to the mortgagee as part of the freehold.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, examined and distinguished.

Appeal from a judgment of Phillimore J.

The question raised by this appeal was as to the right of a mortgagee to trade fixtures placed upon the mortgaged premises subsequently to the date of the mortgage under a hire-purchase agreement.

By a mortgage of November 11, 1902, between George Leadley of the one part, and the plaintiff Joseph Ellis of the other part, a piece of freehold land in Francis Street, Kingston-upon-Hull, with a messuage and premises erected thereon, and recently converted into a laundry, and then in the occupation of the said George Leadley, "And also all and singular the fixed machinery buildings fixed engines and other fixtures now erected or affixed to the said premises and also all other the fixed machinery engines and other fixtures which may at any time hereafter during the continuance of this security be erected or affixed to the said premises or any part thereof," were conveyed

to Joseph Ellis in fee simple subject to redemption in the usual way to secure 400*l.* and interest. The deed contained covenants by George Leadley to insure and keep in repair the buildings, plant, machinery and fixtures, and not to "remove any of the things hereby granted and conveyed from the premises without the written consent of the said Joseph Ellis."

By a hiring agreement of September 21, 1903, between the defendants Glover & Hobson, Limited (manufacturers of laundry machinery and fittings), of the one part, and George Leadley of the other part, the defendants agreed to supply Leadley with a steam washer, a No. 2 hydro and gearing on the following terms :—Leadley was to pay 15*l.* down, and 2*l.* 15*s.* a month until he had paid 113*l.* 18*s.*, when the machinery was to become his property. By clause 5 of this agreement, if the hirer should make default in payment of any of the instalments, the defendants might by notice in writing terminate the hiring, and the hirer was thereupon to deliver up the goods and pay all arrears of rent. If the hirer should refuse or neglect to deliver up the goods, the defendants might enter the premises and retake possession. By clause 7, until the full sum of 113*l.* 18*s.* had been paid, the goods were to remain the sole property of the defendants.

The machinery referred to in this agreement was duly supplied and erected upon the premises, the method adopted for fixing the machines being practically similar to that adopted with the machinery in *Reynolds* v. *Ashby & Son* (1), and the case was argued on the footing that the machines had been so fixed as to pass with the freehold, unless the hire-purchase agreement entitled the defendants to remove them.

In June, 1906, Leadley being still in occupation of the premises, but being in arrear with his payments to the amount of some 66*l.*, the defendants entered the premises, took possession of the goods, and removed them.

In November following the plaintiff Ellis commenced the present action against Glover & Hobson, Limited, to recover the value of these fixtures, and damages for their wrongful removal.

(1) [1904] A. C. 466.

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The action was tried before Phillimore J. on May 8, 1907, who gave judgment for the defendants. The plaintiff appealed. The appeal was heard on December 2 and 3.

J. W. McCarthy, for the appellant. Whatever contract there may have been between the mortgagor and the defendants, who supplied this machinery, it makes no difference to the mortgagee. No private contract can alter the character which the law imposes on the fixtures. The machinery here became a fixture, subject to the right of the defendants to remove it, as against Leadley if he failed to pay his instalments, but this right could not be enforced against the mortgagee, the plaintiff, who was not bound, either at law or in equity, by the hiring agreement: *Hobson* v. *Gorringe*. (1) This case and *Huddersfield Banking Corporation* v. *Henry Lister & Son, Ld.* (2) and *Reynolds* v. *Ashby & Son* (3) are all in favour of the appellant's contention; and in all of them *Gough* v. *Wood & Co.* (4), upon which Phillimore J. relied, is explained and distinguished.

Gough v. *Wood & Co.* (4) turned upon special circumstances from which the Court implied a licence by the mortgagee to remove fixtures for the purposes of the particular business carried on by the mortgagor.

[FARWELL L.J. In the present case there is an express covenant by the mortgagor not to remove any fixtures without the consent of his mortgagee, so there is no need to imply any agreement or licence, as was done in *Gough* v. *Wood & Co.* (4)]

The present case is plainly distinguishable from *Gough* v. *Wood & Co.* (4) on that ground, and it is covered by *Hobson* v. *Gorringe* (1), which was approved of in *Reynolds* v. *Ashby & Son.* (3)

Atkin, K.C., and *Earle*, for the respondents, the defendants. This case is on all fours with, and is governed by, *Gough* v. *Wood & Co.* (4) The express covenant not to remove is not inconsistent with an implied agreement to allow the mortgagor to carry on his trade in the usual way, and for this purpose to enter into a hire-purchase agreement for the supply of machinery, as was done in *Gough* v. *Wood & Co.* (4), a case which lays down

(1) [1897] 1 Ch. 182.
(2) [1895] 2 Ch. 273.
(3) [1904] A. C. 466.
(4) [1894] 1 Q. B. 713.

a general principle, and is not to be confined to the particular circumstances of that case; that this is so appears from the observations of Lindley L.J. (1), where he says the case was governed by the decisions relating to trade fixtures put up by mortgagors in possession, of *Sanders* v. *Davis* (2) and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (3)

In *Hobson* v. *Gorringe* (4) the mortgagee had taken possession while the trade fixtures were still affixed to the freehold, a point which was not present in *Gough* v. *Wood & Co.* (5) or in the present case, and one which was expressly reserved for future decision by Lindley L.J. in his judgment in *Gough* v. *Wood & Co.* (5) So, too, in *Reynolds* v. *Ashby & Son* (6), the fixtures were still affixed when the mortgagees took possession, and the Court of Appeal expressly decided the case on that ground.

The covenant not to remove any fixtures without the leave of the mortgagee is immaterial. This arrangement between the mortgagor and mortgagee does not affect the defendants' right. The law, as settled by *Meux* v. *Jacobs* (7), gives the mortgagee the same rights as are given by this covenant; and, apart from express contract, the case rests on the implied authority given to the mortgagor by the conduct of the mortgagee to bring these fixtures on to the premises, upon fair terms, such as the terms of this hire and purchase agreement—an agreement that is very usual in cases of this kind.

[FARWELL L.J. referred to *The Moorcock.* (8)]

McCarthy replied.

Cur. adv. vult.

Dec. 20. COZENS-HARDY M.R. I have had an opportunity of reading the judgment which Farwell L.J. will deliver, with which I entirely agree.

FLETCHER MOULTON L.J., after shortly stating the facts and the nature of the appeal, continued:—The rights of a mortgagor in possession to remove trade fixtures formed the subject of the

(1) [1894] 1 Q. B., at p. 719.
(2) (1885) 15 Q. B. D. 218.
(3) [1892] 1 Ch. 415.
(4) [1897] 1 Ch. 182.
(5) [1894] 1 Q. B. 713
(6) [1904] A. C. 466.
(7) (1875) L. R. 7 H. L. 481.
(8) (1889) 14 P. D. 64, at p. 68.

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considered decision of the Court of Appeal in the case of *Gough* v. *Wood & Co.* (1), and the argument before us turned chiefly on the meaning and authority of that decision. It is therefore necessary to examine it, and the later cases in which it has been cited, so as to ascertain what it purported to decide, and whether the Court has in any way modified by subsequent decisions the law as there laid down. The facts of that case were very similar to the facts of the present case. A tenant by underlease purchased, on the instalment principle, and fixed on the premises, certain trade fittings, consisting of a boiler and hot-water pipes for use in his trade as a nurseryman, and in the contract (with the permission of the freeholder) granted permission to the defendants, from whom he purchased them, to enter on the premises in case of breach of any clauses of the agreement, and to resume possession of and to remove the same. Subsequently, and before the apparatus was actually delivered, he mortgaged his leasehold interest to the plaintiff. Having failed to pay some of the instalments, the defendants, before the mortgagee entered into possession, entered on the land and unfixed and removed the boiler and pipes. For doing this they were sued by the plaintiff for damages for the removal of the boiler and pipes, which he claimed to be included in his mortgage. Wright J., before whom the action was tried, decided that the plaintiff, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the boiler and pipes as against the defendants. The plaintiff appealed, and the Court of Appeal, consisting of the present Lord Lindley and Kay and A. L. Smith L.JJ., unanimously supported the decision of Wright J., Lindley and Kay L.JJ. delivering separate judgments, and A. L. Smith L.J. adopting that of Lindley L.J.

I have read the judgments in that case very carefully, and they leave no doubt in my mind that the Court deliberately intended to lay down the law as above expressed in relation to all trade fixtures. The language of Lindley L.J. is most explicit on this point. He says (2): "By leaving the mortgagor in

(1) [1894] 1 Q. B. 713. (2) [1894] 1 Q. B. at p. 720.

possession, the mortgagee impliedly authorized him to carry on his business and to sell and remove the plants, trees, and shrubs which, although fixed to the soil, constituted his stock in trade. This implied authority can hardly be confined to such things, but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing bona fide with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded. This implied authority, and the fact that the hot-water apparatus was not the property of the mortgagor are the important features of this case, and are, in my opinion, sufficient to protect the defendants from the claim of the plaintiff." The language of Kay L.J. is equally explicit. He says (1): "As the boiler and pipes were removed while the mortgagor was in possession and was carrying on, with the assent of the mortgagee, a business for the purposes of which they were fixed, I think his licence may be held to extend so far as to permit the removal while that business was being carried on by the mortgagor, and before the mortgagee put an end to it"; and he concludes with the following words: "As the mortgagee has not taken possession in this case before the removal of the fixtures, I think that it is right to imply his assent to the fixing and removal of the boiler and pipes, and that on this ground the decision may be affirmed."

An attempt was made to distinguish the facts of *Gough* v. *Wood & Co.* (2) from the facts of the present case, by the suggestion that in the case of *Gough* v. *Wood & Co.* (2) the mortgagor was a nurseryman, and, therefore, must be considered to have implied authority to remove young trees for the purpose of sale, even though they were fixed to the freehold, and that the Court were influenced by this in coming to the conclusion that there was implied authority to remove the boiler and pipes. In my opinion we should be shewing scant respect to the eminent judges who decided the case of *Gough* v. *Wood & Co.* (2) if we

(1) [1894] 1 Q. B. at p. 723. (2) [1894] 1 Q. B. 713.

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were to suppose them capable of deciding that because a man, being a nurseryman, was entitled to take up and sell young trees, he must therefore be entitled to take up and sell a boiler and hot-water pipes. Moreover, when the judgments are examined, it is, in my opinion, evident that the Court proceeded on no such extraordinary principle as that suggested. The judgments shew clearly that the Court fully appreciated that it was dealing with a general principle, and not with the case of a particular trade. Lindley L.J. says in his judgment: "The present case is, in my opinion, governed by two decisions relating to trade fixtures put up by mortgagors in possession." The two cases to which he refers are *Sanders* v. *Davis* (1), which was a case of trade fixtures put up by a grocer, and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (2), which was a case of a colliery; and he states that the latter case was similar in all material respects to the one that he was then deciding, and Kay L.J. specifically agrees with him in this view. It is therefore impossible to suppose that the Court were affected in any way by the fact that the particular trade carried on by the mortgagor in that case was that of a nurseryman.

The decision of the Court of Appeal in *Gough* v. *Wood & Co.* (3) is of course binding upon us, unless the Court has in subsequent cases given conflicting decisions. The appellant sought to shew that this was the case, and called our attention to three subsequent cases, namely, *Huddersfield Banking Co., Ld.* v. *Henry Lister & Son, Ld.* (4) and *Hobson* v. *Gorringe* (5), in the Court of Appeal, and the case of *Reynolds* v. *Ashby & Son* (6), in the Court of Appeal and in the House of Lords. With regard to the first of these cases, it cannot be said to have in any way varied the law as laid down in *Gough* v. *Wood & Co.* (3), for Lindley L.J., in giving judgment, expressly states that *Gough* v. *Wood & Co.* (3) does not apply to the case at all, and Kay L.J. agrees with him on the point. In the case of *Hobson* v. *Gorringe* (5) the mortgagee had taken possession

(1) 15 Q. B. D. 218.
(2) [1892] 1 Ch. 415.
(3) [1894] 1 Q. B. 713.
(4) [1895] 2 Ch. 273.
(5) [1897] 1 Ch. 182.
(6) [1903] 1 K. B. 87; [1904] A. C. 466.

while the trade fixtures were still affixed to the freehold, a point which was not present in the case of *Gough* v. *Wood & Co.* (1), and was expressly reserved for future decision by Lindley L.J. in his judgment in that case. The judgment of the Court, which was delivered by A. L. Smith L.J., gives no indication of an intention to differ from the decision of the Court in the case of *Gough* v. *Wood & Co.* (1), even if the Court had been entitled so to do. It is true that in both the last-mentioned cases the ratio decidendi of *Gough* v. *Wood & Co.* (1) was rightly stated to be that the mortgagee had in that case acquiesced in the removal, by the mortgagor during his tenancy, of trade fixtures; but it must be remembered that this acquiescence was implied by the Court solely from the fact that the mortgagee had allowed the mortgagor to remain in possession and carry on his trade on the premises, and no other act of acquiescence was even suggested. In the case of *Reynolds* v. *Ashby & Son* (2), also, the fixtures were still affixed to the freehold when the mortgagees entered into possession; and the Court of Appeal expressly decided it on that ground, the Master of the Rolls (now Lord Collins) pointing out that the judgments in *Gough* v. *Wood & Co.* (1) expressly leave open the question whether the right to remove exists after the mortgagee has taken possession, and that the case of *Hobson* v. *Gorringe* (3) decided this point in favour of the mortgagee. No doubt whatever is thrown upon the correctness of the decision in *Gough* v. *Wood & Co.* (1) When this case came before the House of Lords the decision of the Court of Appeal was supported on the particular facts of the case, but again it is evident that no doubt whatever was intended to be thrown on the correctness of the decision in *Gough* v. *Wood & Co.* (1) Lord Lindley, who was a party to the decision, says in his judgment: "After the machines were fixed and before the appellant claimed them the second mortgagee took possession, the appellant's right to enter and remove the machines, resting as it did on his contract with Holdway, ceased to be exerciseable." The learned Lord therefore treated the appellant, who was the person from whom the machines were hired, as having the right

(1) [1894] 1 Q. B. 713. (2) [1903] 1 K. B. 87; [1904] A. C. 466.
(3) [1897] 1 Ch. 182.

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to enter and remove the machines up to the time when the mortgagees entered into possession, at which moment that right ceased. This is precisely what was decided in the case of *Gough* v. *Wood & Co.* (1), supplemented by *Hobson* v. *Gorringe.* (2)

I am therefore of opinion that these cases decide that in general a mortgagor in possession has the right to permit trade fixtures to be fixed and unfixed on the premises, provided that they are unfixed before the mortgagee takes possession, but that the right to unfix them ceases when possession is taken by the mortgagees, and that the law so laid down is binding upon this Court.

I desire to add that, apart from the fact that the decision in *Gough* v. *Wood & Co.* (1) is binding upon this Court, I am of opinion that the decision was a right one. Indeed, speaking for myself personally, I can hardly see how a different conclusion could be arrived at. No doubt the fact that a mortgage, according to English practice, takes the form of a conveyance with a right of redemption has led to the mortgagee being treated in many respects as the true owner, and the assignment as having the same effect as an absolute assignment. But I am not aware that the Courts have ever given the mortgagee higher rights than an owner in fee simple. The rights of Gough could not, therefore, be put higher than if the premises had been absolutely assigned to him and he had allowed the mortgagor to remain in possession as tenant at will. But, if that had been the case, it is undoubted law that the mortgagor would have been entitled to fix and unfix trade fixtures, provided only that they were unfixed by him before he had been turned out of possession. This no doubt accounts for the importance attached in the later cases to the mortgagee having taken possession while the fixtures were still on the premises.

I now come to the feature of the case which, though not referred to in the Court below, has given to me the most difficulty. I allude to the terms of the mortgage itself. Our attention has been called to two passages in it. In the first place, the assignment specifically includes—"All and singular the fixed machinery buildings fixed engines and other fixtures now erected or affixed to the said premises and also all other the

(1) [1894] 1 Q. B. 713. (2) [1897] 1 Ch. 182.

fixed machinery engines and other fixtures which may at any time hereafter during the continuance of the security be erected or fixed to the said premises or any part thereof." I cannot think that these words establish any difference between the present case and that of *Gough* v. *Wood & Co.* (1), because they add nothing to that which would have been held to pass to the mortgagee by the mere assignment of the freehold. That being the case, a specific enumeration of these matters does not affect the meaning or effect of the mortgage. In other words, the mortgage would mean exactly the same whether or not those words appeared therein. But later on there occurs the following covenant: "And also that the said George Leadley will not remove any of the things hereby granted and conveyed from the premises without the written consent of the said Joseph Ellis." Now the case of *Gough* v. *Wood & Co.* (1) was decided on the ground that the Courts must imply a permission by the mortgagee that the mortgagor, so long as he was in possession, might fix and unfix trade fixtures. But if such an implied permission is at variance with the express language of the contract between the mortgagee and the mortgagor, no implied permission can, as between them, be supported. The same principle applies to the case of landlord and tenant, where it has been held that trade fixtures may become irremovable if on a true interpretation of the contract between the tenant and his landlord it appears that the tenant has renounced his right to take them away during the term. With great reluctance I feel compelled to accept the validity of this argument in the present case, though I feel that in the view of the notoriety of the existence of hire-purchase agreements in connection with many classes of trade fixtures it opens the door to transactions between mortgagors and mortgagees of an essentially fraudulent character. It is impossible in England for any one to ascertain whether or not a mortgage exists on any particular property, so that the vendor under such an agreement cannot protect himself against a fraudulent representation by the purchaser that the premises are not mortgaged, and, even if he could do so, it would give him no real protection, because the purchaser might

(1) [1894] 1 Q. B. 713.

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subsequently to the delivery of the fixtures and their being put in place execute a mortgage which would transfer the property in them to the mortgagee. Such frauds would be put a stop to if the principle that the mortgagee gives an implied authority to the mortgagor to carry on his business in the way described in the judgment of Lindley L.J. in *Gough* v. *Wood & Co.* (1) were to be held to create an estoppel on the part of the mortgagee who has permitted the mortgagor to remain in possession as against suppliers of the fixtures who have no notice of the mortgage. But I can find no case which goes so far, and, in the absence of authority, I do not feel entitled to differ from the opinion of my brethren on the point, and it must be left to legislation, or to the decision of a higher tribunal, to protect honest traders from dangers which they can neither foresee nor guard against. I fully agree with Lord Lindley's opinion that unless this can be effectually done "persons dealing bona fide with mortgagors in possession will be exposed to very unreasonable risk, and honest business with them will be seriously impeded."

FARWELL L.J. The law relating to fixtures as between mortgagor and mortgagee falls far short of perfection, but I venture to think that it has at least the merit of being settled. In 1875 the House of Lords decided in *Meux* v. *Jacobs* (2) that "A mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage will also (unless under special stipulations) pass to the mortgagee."

This, however, does not necessarily prevent the mortgagor while in possession from dealing with such fixtures. If machinery is in fact affixed in such a manner as to become a fixture under a purchase or hiring agreement by which, as between mortgagor and vendor, it remained the property of the latter, the mortgagee can undoubtedly take possession of the machinery as part of his security, although

(1) [1894] 1 Q. B. 713. (2) L. R. 7 H. L. 481.

not paid for, and although put up after the mortgage, and although the vendor had no knowledge of the existence of the mortgage: *Reynolds* v. *Ashby & Son* (1); but if he does not care to take possession (and few mortgagees with a sufficient security care to do so), I think that a mortgagee would fail to obtain an injunction to restrain the removal of such fixtures, unless he also proved that his security was deficient, or would become so by such removal, on the same principle that prevents the mortgagee from obtaining an injunction to restrain a mortgagor from cutting timber or committing waste in similar circumstances; nor could he obtain damages except in a case of deficiency of security, for he would have suffered none.

There is in these cases no question of holding out by allowing the mortgagor to continue in possession. The doctrine of holding out is simply estoppel by conduct: if a man acts or authorizes another to act in such a way as to invite third persons to act on an assumption of facts that do not really exist, he cannot be heard to deny the existence of those facts, because it was his duty to take steps to prevent third persons from acting on the assumption produced by himself. But a mortgagee is under no duty to give notice of his mortgage urbi et orbi, nor even, if it be of property on which machinery or the like may probably be affixed, to all persons who supply such machinery on the hire or purchase system; nor is he under any duty to inquire before lending his money whether all the fixtures that he sees on the premises have been paid for or are the absolute property of the mortgagor. A mortgagee is entitled, in accordance with the ordinary usages of mankind in this country, to leave his mortgagor in possession, and no one can be heard to say that he has been induced by such possession to believe that the mortgagor was the unincumbered owner. Different considerations might well apply to the case of a mortgagee in possession allowing the vendor to erect fixtures under a hire or purchase agreement made with the mortgagor before the mortgagee took possession, but these do not arise in the present case. Apart from these matters, the only mode in which the mortgagee's rights against the mortgagor, whether

(1) [1904] A. C. 466.

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in possession or not, and every one claiming through such mortgagor, can be affected is by agreement, express or implied, to which he is a party; whether it is called licence or not is immaterial—it is an agreement or nothing. Now it has been argued—and Phillimore J. has said—that "where premises are obviously trade premises which will require machinery to work them if a mortgagee allows a mortgagor to remain in possession and takes a mortgage of trade engines upon the premises, he must be taken impliedly to license the mortgagor to bring those engines upon the premises on fair terms, fair to him and fair to the seller or hirer. Now we know from common knowledge that expensive articles, such as machinery, are frequently bought by people who have little capital—and obviously this mortgagor had little capital—on the hire-purchase system, and that therefore there is an implied license to the mortgagor to acquire and fix to the freehold chattels which he may also unfix if good faith between him and the person from whom he acquires them compels him to unfix." This proposition proves far too much; it would prevent a mortgagee, on taking possession, from acquiring any right to the fixtures not yet paid for in full, but this he is undoubtedly entitled to do: *Reynolds* v. *Ashby & Son.* (1) The vendor is equally injured by the loss of his machinery, whether such loss arises from the mortgagee's taking possession, or from any other cause. But in my opinion there is no such general presumption. I do not suppose that the learned judge meant that it was a presumption de jure, but in my opinion there is no such presumption at all. It is a question of implied contract, and that must depend on the circumstances of each particular case. The law implies a contract only for the purpose and with the object of giving such efficiency to the transaction as must have been intended by both parties, to make each party promise in law as much as was in the contemplation of both parties that he should be responsible for: *The Moorcock.* (2) I am unable to discover, in the case of a mortgage of a shop or buildings where a business is carried on, any ground whatever for assuming that the mortgagee agrees to give up any part of the security that his deed undoubtedly gives him by law. There

(1) [1903] 1 K. B. 87; [1904] A. C. 466. (2) 14 P. D. 64, at p. 68.

is no reason why he should do so: the business is not mortgaged to him, nor has he any charge on it; his only security is the freehold or leasehold land and buildings. It is possible that different considerations might apply to the mortgage of a business as a going concern; but it would depend on the facts of the case. *Gough* v. *Wood & Co.* (1) was relied on, but it is clear that it depended on the special circumstances of the case, and I do not think it has ever been cited except to be distinguished. The property mortgaged in that case was a leasehold nursery garden, with the usual trees and plants and shrubs growing on it. The Court of Appeal held that the mortgagor was left in possession in order to carry on his business. Lord Lindley said (2): "By leaving the mortgagor in possession the mortgagee impliedly authorized him to carry on his business and to sell and remove the plants, trees, and shrubs which, though fixed to the soil, constituted his stock-in-trade. This implied authority can hardly be confined to such things, but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired"; and Kay L.J. says (3): "The mortgagor was a nurseryman carrying on his business upon the land mortgaged. He was left in possession by the mortgagee, and during such possession it must be inferred that the mortgagee assented to the mortgagor doing everything that was usual and proper to enable him to trade as a nurseryman. For example, until prevented by the mortgagee taking possession, he might remove and sell the young trees that he was cultivating for that purpose, though they, while growing, were a part of the land. If then, while in such position, he obtained the boiler and pipes upon an agreement which allowed the vendor to remove them if default was made in paying for them, why should not the mortgagee be taken to have assented to the vendor being allowed to remove them, just as a purchaser of trees might do with the consent of the mortgagor in possession?" But this reasoning has no

(1) [1894] 1 Q. B. 713. (2) Ibid. at p. 720.
(3) Ibid. at p. 722.

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application to a case like the present, where the mortgage is simply of a messuage or dwelling-house with the fixed machinery then and thereafter to be affixed; there is nothing corresponding to the trees of the nurseryman from which an inference can be drawn which would extend to other fixtures.

The present case presents a further difficulty to the claimant, which, although not referred to by Phillimore J., is in my opinion insuperable. It is impossible to write into any instrument by implication a term which is inconsistent with the express terms of the written document; in this case the mortgagor expressly covenants not to "remove any of the things thereby granted and conveyed from the premises without the written consent" of the mortgagee. The question is not whether the permission to the vendor to remove is a breach of this covenant, but whether in the face of it it is possible to imply an authority to the mortgagor to give any such permission. In my opinion it is not, and on all these grounds this appeal should be allowed, with costs here and below.

Appeal allowed.

Solicitors: *Indermaur & Brown, for Bedell Suddaby, Hull; H. J. Mannings.*

W. C. D.

MORRISTON TINPLATE COMPANY *v.* BROOKER, DORE & CO.

1907
Dec. 19.

County Court—Jurisdiction—Staying Proceedings where Submission to Arbitration—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49)*; ss.* 4, 27.

A county court judge has jurisdiction, under s. 4 of the Arbitration Act, 1889, to stay any legal proceedings in his court by any party to a submission against another party in respect of any matter agreed to be referred.

APPEAL from the decision of the county court judge at Swansea.

This action was brought in the Swansea County Court to recover 57*l.*, the balance of the price of goods sold and delivered by the plaintiffs to the defendants under a contract in writing which contained this clause: "Any dispute arising to be settled by arbitration."

The defendants applied to the county court judge to stay the proceedings and refer the matter to arbitration, under s. 4 of the Arbitration Act, 1889 (1), upon the ground that there was a submission to arbitration. The county court judge held that the provisions of s. 4 did not apply to proceedings in the county court, and dismissed the application.

The defendants appealed.

W. de B. Herbert, for the appellants. Prima facie a county court judge has, in an action within the jurisdiction of the county

(1) The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4: "If any party to a submission . . . . commences any legal proceedings in any Court against any other party to the submission, ... in respect of any matter agreed to be referred, any party to such legal proceedings may . . . . apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Sect. 27: "In this Act, unless the contrary intention appears,—

"'Court' means Her Majesty's High Court of Justice.

"'Judge' means a judge of Her Majesty's High Court of Justice."

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court, all the powers and jurisdiction of a judge of the High Court, e.g., as to granting an injunction, staying proceedings, and matters of that kind. The provisions of s. 4 of the Arbitration Act, 1889, apply to a county court. It is suggested that they do not apply, because s. 27 defines "Court" to mean "Her Majesty's High Court of Justice," and "judge" to mean "a judge of Her Majesty's High Court of Justice." But s. 27 is qualified by the words "unless the contrary intention appears"; and s. 4 provides that, if a party to a submission commences legal proceedings in "any Court," that Court or a judge thereof may stay the proceedings. The use of the words "any Court" shews a contrary intention, within the meaning of s. 27, and "any Court" is not limited to the High Court.

[He was stopped by the Court.]

L. M. Richards, for the respondents. There is no jurisdiction in the county court to stay proceedings under s. 4 of the Arbitration Act. In the Annual County Courts Practice, 1907, p. 252, it is stated: "It is doubtful whether the judge has jurisdiction to stay proceedings under s. 4 of the Arbitration Act, 1889, where there is a submission to arbitration; the better opinion would seem to be that he has not." The authority cited for that opinion is *Runciman* v. *Smyth* (1), where the Lord Chief Justice said that "on the question whether the county court judge had jurisdiction to make this order he did not propose to express an opinion, but he was not by any means satisfied that a county court judge had a right to stay proceedings, though he did not wish to express any final opinion upon it"; and Kennedy J. agreed. In s. 27 "Court" is defined to mean the High Court, and "judge" to mean a judge of the High Court; and, therefore, "Court" in s. 4 means the High Court only.

CHANNELL J. In this case we have to deal with an appeal from the decision of the county court judge, who held that he had no jurisdiction to entertain an application to stay proceedings under s. 4 of the Arbitration Act, 1889. It was contended before him that he had no jurisdiction, and he so held. The justification for his opinion is a passage in the Annual County Courts

(1) (1904) 20 Times L. R. 625.

Practice, 1907, p. 252, where it is stated that the better opinion would seem to be that a county court judge has no jurisdiction to stay proceedings under s. 4. That better opinion seems to be founded upon an expression of opinion by the Lord Chief Justice in *Runciman* v. *Smyth* (1), where he does seem to have expressed a doubt upon this point; but that case was decided upon another point. That expression of doubt justified the statement of the editors of the Annual County Courts Practice, and also the county court judge in coming to his decision. On looking into the matter, however, the point seems to me to be very clear. The definition section of the Arbitration Act, s. 27, says that "unless the contrary intention appears," "Court" means the High Court of Justice, and "judge" means a judge of the High Court; but in s. 4 the words are "any Court" and "that Court," and those words, in my opinion, indicate a contrary intention. We cannot read the words "any Court" as being limited to the High Court of Justice; they mean *any* Court, and I think that there is nothing more to be said upon the point. It is quite clear to my mind that the county court judge had jurisdiction. I think that in *Runciman* v. *Smyth* (1) the Lord Chief Justice and Kennedy J. did not fully consider or intend to decide this point. We think that this case must go back for the county court judge to consider and decide the application upon its merits, and that this appeal must be allowed.

BRAY J. I agree, and I would not add anything were it not that this is the first time that the point whether a county court judge has jurisdiction under s. 4 of the Arbitration Act has come up for actual decision. I will shortly state the reasons why I think that the county court judge has jurisdiction. It is true that under the Arbitration Act, as a rule, the High Court and a judge thereof alone have jurisdiction, as, for instance, to set aside an award, to order a special case to be stated, or to decide questions upon a special case stated by an arbitrator. Looking through the Act, we find that almost always the words "Court or a judge" are used, and those words are well-known words in statutes of this kind, and prima facie mean the High Court or

(1) 20 Times L. R. 625.

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a judge thereof, and accordingly in s. 27 the words are so defined "unless the contrary intention appears." But in s. 4 there is a deliberate use of different and wider words, for it provides that if any party to a submission commences any legal proceedings "in any Court," that Court or a judge thereof may stay the proceedings. It seems to me that there was a deliberate use of those different words "any Court," and that the intention was that any Court should have jurisdiction to stay proceedings when there was a submission to arbitration. It would be strange if it were otherwise, for an action to recover 100*l.* might be brought in a county court when there was a submission to arbitration and proceedings could not be stayed, while if the claim was for 101*l.* and the action had to be brought in the High Court the proceedings could be stayed. It seems obvious that, if a party to a submission cannot proceed in the High Court, he ought not to be allowed to proceed in the county court, and that is the reason why, in my opinion, the Legislature has used the words "any Court" in s. 4.

SUTTON J. I agree.

Appeal allowed.

Solicitors for plaintiffs: *Lambert & Hale, for R. & C. B. Jenkins, Swansea.*

Solicitors for defendants: *Foss & Bryant.*

F. O. R.

[IN THE COURT OF APPEAL.]

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Dec. 3, 4, 7, 20.

THE KING *v.* CARSON ROBERTS.

Local Government—London—Metropolitan Borough—Audit of Accounts—Auditor—Powers and Duties—Surcharge—Certiorari to quash—Jurisdiction of Court—London Government Act, 1899 (62 & 63 *Vict. c.* 14), *s.* 14—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 35.

On an application for a certiorari under s. 247, sub-s. 8, of the Public Health Act, 1875, to remove and quash disallowances and surcharges made by an auditor acting in pursuance of that section, the jurisdiction of the Court is not confined to error in point of law, but extends to error in point of fact.

So *held* by the Court of Appeal, affirming the decision of the Divisional Court, [1907] 2 K. B. 878.

Reg. v. *Haslehurst*, (1887) 51 J. P. 645, followed and approved.

Per Cozens-Hardy M.R. and Farwell L.J.: An auditor appointed by the Local Government Board under s. 247 of the Public Health Act, 1875, to audit the accounts of a metropolitan borough council is authorized and required by sub-s. 7 to decide whether any member or officer of the council has been guilty of negligence or misconduct in relation to the accounts whereby loss has been occasioned to the council, and to assess the amount of the loss.

Per Fletcher Moulton L.J.: The powers and duties of the auditor under sub-s. 7 of s. 247 are strictly confined to auditing, and the words "person accounting" in the latter part of that sub-section, which requires the auditor to "charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person," mean the person who brings in accounts for audit. Therefore, where the accounts submitted for audit are the accounts of a metropolitan borough council, the person accounting is the council, and the auditor has no power to inquire into the negligence or misconduct of the individual members or servants of the council.

APPEAL from a decision of the Divisional Court—Lord Alverstone C.J. and Darling and Phillimore JJ. (1)—directing writs of certiorari to issue to quash certain surcharges made by the auditor appointed by the Local Government Board to audit the accounts of the city of Westminster for the year ending March 31, 1906.

The auditor was appointed under ss. 247 and 250 of the Public

(1) [1907] 2 K. B. 878.

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Health Act, 1875 (1), which by the combined effect of s. 14 of the London Government Act, 1899, and s. 71, sub-s. 3, of the Local Government Act, 1888, were made applicable to the audit of the accounts of the metropolitan boroughs.

In the course of the audit the auditor surcharged jointly and severally upon certain members of the highway committee of the council several sums representing losses incurred by the council in respect of contracts for horse forage, fine crushed ballast, carbolic acid, and boots respectively, by reason, as the auditor alleged, of the negligence or misconduct of such members in the selection of tenders for the articles in question. The certified amount of the surcharge for horse forage was 71*l.* 3*s.* 7*d.*, and the reasons stated by the auditor in his certificate for making this surcharge were because a deficiency or loss to the funds of the council to at least the extent of the surcharge had been incurred by the selection of a tender for the supply of horse forage to standard

(1) The Public Health Act, 1875, s. 247, sub-s. 7, provides: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made:"

Sect. 247, sub-s. 8, provides: "Any person aggrieved by disallowance made may apply to the Court of Queen's Bench for a writ of certiorari to remove the disallowance into the said Court, in the same manner and subject to the same conditions as are provided in the case of disallowances by auditors under the laws for the time being in force with regard to the relief of the poor; and the said Court shall have the same powers with respect to allowances disallowances and surcharges under this Act as it has with respect to disallowances or allowances by the said auditors; or in lieu of such application any person so aggrieved may appeal to the Local Government Board, which Board shall have the same powers in the case of the appeal as it possesses in the case of appeals against allowances disallowances and surcharges by the said poor law auditors:"

[The effect of this sub-section is that applications thereunder for a writ of certiorari at the present time are regulated by s. 35 of the Poor Law Amendment Act, 1844, which is fully set out in a note to the previous report of this case.]

sample for the use of the highways department in the second half of the financial year which exceeded the lowest quotations and likewise the tenders of other single firms in every item, and was in fact the highest of the seven tenders received, and which, when worked out on the purchases of the half-year, shewed an excess over the lowest quotations of 101*l.* 15*s.* 2*d.* and over the tender of another single firm of 71*l.* 3*s.* 7*d.*, and because the members therein surcharged were jointly and severally responsible by their negligence or misconduct for the said deficiency or loss in that they did at a meeting held on July 19, 1905, select this tender for recommendation to the council, and did neglect the lower tenders referred to above, and had neither recorded any reason for doing so nor submitted any explanation in reply to the inquiries made at audit.

The sums surcharged in respect of fine crushed ballast, carbolic acid, and boots were included in a further certificate, and amounted respectively to 184*l.* 2*s.* 6*d.*, 15*l.* 15*s.* 10*d.*, and 50*l.*

The auditor's reasons for making the surcharge of 184*l.* 2*s.* 6*d.* were, principally, because a deficiency or loss to the funds of the council to the extent of the surcharge had been incurred by the selection of a tender for the supply of fine crushed ballast, which exceeded by 9*d.* per cubic yard, or by 184*l.* 2*s.* 6*d.* in aggregate, the price at which another contractor of good repute had offered to supply this material, and because the members of the highway committee therein surcharged were jointly and severally responsible by their negligence or misconduct for the said deficiency or loss—(i.) in that they did, in inviting tenders for the supply of the material, include in the form of tender other materials which were not, and never had been, required by them; and (ii.) in that they did at a meeting held on March 1, 1905, select a tender for this group of materials on the strength of quotations which to their knowledge did not relate to any possible or probable purchases by them; and (iii.) in that they neglected the lower tender referred to above in the case of the only material on the list which was required by them, and had neither recorded any reason for so doing nor submitted any explanation of any weight in reply to the inquiries made at audit. The reasons given by the auditor with regard to the two smaller

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items, viz., the 15*l.* 15*s.* 10*d.* and the 50*l.*, were of a similar character.

The auditor also surcharged upon Mr. Arthur Ventris, the assistant engineer of the council, a sum of 343*l.*, made up of a sum of 158*l.* 17*s.* 6*d.* and the sum of 184*l.* 2*s.* 6*d.* already referred to, in relation to the supply of fine crushed ballast.

His reasons for making the surcharge of 158*l.* 17*s.* 6*d.* were, in substance, because a deficiency or loss to the funds of the council had been incurred to that extent, inasmuch as 410 cubic yards of the material had been charged for in the accounts of the council in excess of the amount actually supplied, and because this deficiency or loss was incurred by the negligence or misconduct of Ventris—(i.) in that he, being the officer responsible for the management of the highways department, had failed to institute any system of measuring or of testing the measure of the yards of ballast which the contractor claimed to have delivered; and (ii.) in that he passed for payment and certified as verified the invoices of this material, which included at least 410 cubic yards in excess of the amount which was actually delivered.

In his reasons for making the surcharge of 184*l.* 2*s.* 6*d.* the auditor, after stating again the amount of the loss to the council by reason of the acceptance of the higher tender, attributed this loss to the negligence or misconduct of Ventris—(i.) in that he, in drawing up the form of tender for the supply of this material, included other materials which were not, and never had been, required by his department, and for which the works department of the council invited separate tenders; (ii.) in that, in tabulating the tenders received, he marked the lowest quotation for each item of the tender without adding any note of the fact that only one material was of any importance, and allowed the selection to be based on quotations for a material of which no purchases were probable or possible.

The auditor also surcharged the sum of 158*l.* 17*s.* 6*d.* above referred to upon certain members of the finance committee who had signed cheques in payment of this ballast, but it is unnecessary to refer to this further, as there was no appeal from the decision of the Divisional Court as to this.

Before finally making these surcharges the auditor sent to the

persons subsequently surcharged a notice stating that it appeared to him that they were liable to surcharge in respect of the short delivery of ballast and in respect of the loss arising from undue or unexplained preference in the selection of tenders for the supply of the several articles already referred to, and stating that the audit was adjourned to give them an opportunity of making any representations they might think fit.

In answer to this invitation the town clerk handed in identical written statements made by him on behalf of the several members of the highway committee, which, after denying liability and traversing the allegations of the auditors, went on to state that the member did not take any part in the selection of the tenders otherwise than in the capacity of a duly appointed member of the committee, and that the committee, after a careful consideration of all the circumstances and acting bona fide in the exercise of their discretion, had come to the conclusion that the tenders in question were the most advantageous to accept in the interest of the city council and of the ratepayers, and accordingly recommended the council to accept them.

Mr. Ventris also made a statement which consisted of a traverse of the auditor's allegations and a denial of liability.

With reference to the alleged short delivery of ballast it appeared—(1.) that the count of loads was the basis of the computation of the 4910 cubic yards entered on the bills; (2.) that a great majority of the loads were taken to the street bins; (3.) that, so far as Ventris knew, none of the loads had been measured; (4.) that the loads taken to the depots were weighed in the ordinary course, and their weights recorded on the delivery notes.

Upon comparison of the bills with the delivery notes it appeared that each load was taken in the computation to contain one and a quarter cubic yards, although the auditor considered that the more usual practice was to reckon a load as equivalent to one cubic yard.

In January, 1907, the auditor requested Mr. Ventris to obtain the weight of a measured cubic yard of the crushed ballast then being supplied to the city under as nearly as possible average conditions in regard to moisture, &c. This was done, and the

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result was that the measured yard turned the scale at 1 ton 2 cwt. 2 qrs., and the auditor adopted this as the standard weight of a yard of the ballast now under consideration. The auditor found that 270 of the loads had been delivered at the depots in the course of the year, and, taking the load as equivalent to one and a quarter cubic yards, it appeared from the recorded weights that the average per yard as delivered was 1 ton 0 cwt. 2·25 qrs. The auditor calculated that this was a difference of something over 8 per cent., which gave an excess of 423 cubic yards, and he in fact disallowed the price of 410 yards.

It appeared, however, that the ballast weighed by the auditor was not the ballast under consideration, but was supplied by another contractor. This ballast was prepared by a different process, known as the wet process, with the result that the ballast after crushing weighed heavier by reason of the presence of the water and the less effectual removal of the sand. This fact was brought to the notice of the auditor before he made his final surcharge. Subsequently a cubic yard of the material now in question was weighed, and it was established to the satisfaction of the Divisional Court that there was no appreciable deficiency in the amount delivered.

With regard to the form of the tenders, it appeared that they were drawn up by the town clerk on the instructions of the council, and that the materials included therein for the annual supplies were selected by a joint sub-committee of the highways and works committee in February, 1904, since which time the forms had remained unaltered. In March, 1905, the highways department advertised for tenders for a group of items, viz., 2 in. ballast, $\frac{3}{8}$ in. ballast (which was the fine crushed ballast already referred to), and $\frac{5}{16}$ in. ballast, sand, red sand and crushed granite. The only item purchased by the department was $\frac{3}{8}$ in. ballast, and the rough 2 in. ballast had never been purchased by the department. Messrs. Covington & Son, the firm which secured the contract, sent in the lowest quotation for 2 in. ballast, but (as already stated) their quotation for $\frac{3}{8}$ in. ballast was 9*d.* per cubic yard higher than that of another firm of good repute. Mr. Ventris, while admitting that the tender included items which had not in fact been required by the

committee, denied that these were items of which no purchase was possible or probable.

The evidence on both branches of the case is fully dealt with in the judgment of Fletcher Moulton L.J.

The several persons surcharged having obtained rules nisi for a certiorari to bring up and quash the surcharges made by the auditor, the Divisional Court made the rules absolute. They held that they had jurisdiction to review the decision of the auditor if it was erroneous either in point of law or in point of fact, and, dealing with the case on the merits, they came to the conclusion upon the evidence that the auditor had failed to prove negligence or misconduct on the part of any of the persons surcharged.

The auditor appealed except as to the surcharge upon the members of the finance committee.

Lord Robert Cecil, K.C., *Danckwerts, K.C.*, and *Weigall*, for the appellant. The Local Government Board have always acted on the appellant's view of this question, and endeavoured to restrain the wastefulness of local authorities. The responsibility ought not to be upon the servants of the authority, but upon the members of the authority who employ them; and any of those members may be surcharged. By the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), the administration of the poor law was put under a Board of Commissioners of whom the Local Government Board are the direct successors. By s. 109 of that Act an auditor was to be construed to mean "every person, other than justices of the peace acting in virtue of their office, appointed or empowered to audit, control, examine, allow, or disallow the accounts of any guardian, overseer, or vestrymen relating to the receipt or expenditure of the poor rate." Therefore the accounts were not those of the officer who actually received the money, but those of his employers. The duty of the auditor was not merely to examine the arithmetic and the paper of the accounts, but he was bound to go deeper. A power to "allow or disallow" implies a power to control the accounts: *Reg.* v. *Tyrwhitt.* (1) The qualifications of an auditor considered

(1) (1853) 2 E. & B. 77.

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necessary by the Poor Law Commissioners included a knowledge of the Poor Law Statutes Rules and Orders and the law of contracts, without which it would be impossible for him to ascertain, as he was bound to do, the reasonableness of every item: General Order for Accounts, January 14, 1867, art. 38; Glen's Poor Law Orders, 11th ed. p. 616, note 2. By art. 48 he could surcharge any person who had wasted money belonging to the union or parish.

The respondents have wasted funds which were under the control of the city council. By ss. 8 and 9 of the London Government Act, 1899 (62 & 63 Vict. c. 14), committees have power to spend these funds, and by s. 14 their accounts have to be audited. No special accounts of the committees are kept; therefore the whole of the accounts kept by the council have to be audited. That this is so is shewn by s. 141 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 71 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and ss. 247 and 250 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

By s. 16 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), and s. 247, sub-s. 5, of the Public Health Act, 1875, auditors have power to administer an oath to witnesses, and by the common law of England they are bound to give an opportunity of being heard to everybody against whom they may decide. That is always done in these cases, and there is no difficulty in the practice. [*Reg* v. *Carey* (1) was referred to to shew the power to compel evidence by the issue of a subpœna from the Crown Office.] Auditors are bound by sub-s. 7 of s. 247 of the Public Health Act, 1875, to disallow every item of account contrary to law, and to certify the amount due from any person; and by sub-s. 9, if there is no appeal, the justices must enforce payment. They have no discretion in the matter: Lumley's Public Health Acts, 6th ed. vol. 1, p. 361, and cases there cited.

The respondents are the persons who must make good these losses. The person who actually makes the entry in the books of account is not responsible for the expenditure. He only pays because the money has to be paid under the contract of his employers. The question is, Who authorized the payment? The

(1) (1845) 7 Q. B. 131, 134.

words "person accounting" in sub-s. 7 of s. 247 of the Public Health Act, 1875, which reproduces the language of s. 32 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), mean not only a person who in fact accounts, but anybody who is bound to account. The object of all these provisions is to check waste. The highways committee recommended the council to accept this contract. The tenders did not come before the council itself. The committee saw them and reported on them, and the advice given by the committee was the cause of the loss. They ought to have warned the council that there were two tenders by equally good contractors, and that they had selected the higher one.

On an appeal it has been held that the Court, under s. 35 of the Poor Law Amendment Act, 1844, can review the decision of the auditor, not only when it is erroneous in point of law, but when it is erroneous in any sense: *Reg.* v. *Haslehurst.* (1) But the Court only considers whether the auditor had facts before him on which he could have reasonably arrived at his decision. The Legislature never intended that there should be a new trial, but only that there should be a proceeding analogous to a certiorari: *Colonial Bank of Australasia* v. *Willan.* (2) The question before the Divisional Court was not whether the auditor had jurisdiction, but whether his findings were justified on the materials before him: *Reg.* v. *Bolton.* (3) That implies a power also to consider questions of law: *Reg.* v. *Knott* (4); *Reg.* v. *Hunt.* (5) The nature of certiorari indicated here is the same as that relating to orders of the justices: *Ex parte Overseers of Spottland.* (6)

Sir R. Finlay, K.C. (with him *Walter Ryde*), for the respondents. There is here no evidence upon which the auditor could reasonably find negligence or misconduct either on the part of the members of the highways committee or on the part of Ventris.

[COZENS-HARDY M.R. We will relieve you as to Ventris.]

The only ground of complaint against the committee is that the accepted tenders were not the lowest.

(1) 51 J. P. 645.
(2) (1874) L. R. 5 P. C. 417, 442, 443.
(3) (1841) 1 Q. B. 61.
(4) (1866) 15 L. T. (N.S.) 291.
(5) (1856) 6 E. & B. 408.
(6) (1860) 24 J. P. 323.

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[FARWELL L.J. It is a little more than that. The committee declined to give any explanation to the auditor in answer to his inquiries. If your contention is right, there will be no means of checking the contracts of this committee.]

Anybody acquainted with business must know that it is frequently a most injudicious thing to accept the lowest tender, and on the facts here proved the mere refusal of the committee to give an explanation of their conduct is not a ground for imputing negligence or misconduct. Given good faith, it was beyond the province of the auditor to go into the question of the tenders. The result of holding that the auditor, who is not a judicial officer, has the extraordinary powers contended for on his behalf will be to drive persons of position from seeking election on these borough councils. Under s. 247, sub-s. 7, of the Public Health Act, 1875, the function of the auditor is confined to dealing with the items of the account. He may, of course, report to the Local Government Board if any difficulty arises, and the Local Government Board may direct an inquiry, but under s. 247 he has no power to hear evidence. Sect. 16 of the Evidence Act, 1851, has therefore no application to this case. That is the view taken of the functions of an auditor under the Poor Law Amendment Act, 1844, s. 32 (which is similar in its terms to s. 247 of the Public Health Act), in Burn's Justice of the Peace, 29th ed. vol. 4, p. 65, note.

[FARWELL L.J. referred to a circular issued by the Poor Law Commissioners on March 1, 1836, respecting the duties of parochial officers (set out in Burn's Justice of the Peace, 30th ed. vol. 4, pp. 1104-7) upon the question whether the auditor had jurisdiction to investigate tenders.]

The Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), contains elaborate provision for the prevention and punishment of corruption in the matter of tenders or otherwise on the part of the officers and servants of borough councils, and the inference from that is that this question is not within the province of the auditor. The only power of the auditor is against a person who is accountable in the sense of having in his hands money or goods for which he is liable to account. That does not apply to a committee. Sect. 247 contemplates a checking of accounts,

not a checking of policy. That the Divisional Court has jurisdiction to review the decision of the auditor on the merits is conclusively shewn by *Reg.* v. *Haslehurst.* (1)

[COZENS-HARDY M.R. We agree with that decision.]

[Counsel also referred to the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), as shewing the contrast between the powers of the Auditor-General and those of an auditor appointed under the Public Health Act, 1875.]

Lord Robert Cecil, K.C., in reply. Upon the question whether an auditor appointed by the Local Government Board has a right to demand explanations and to hear evidence *Rex* v. *More O'Ferrall* (2) is a clear authority in favour of the appellant.

[COZENS-HARDY M.R. There the question was one of illegality.]

If an auditor is bound to determine questions of negligence or misconduct, he must have power to ask for explanations; for in most cases it is almost incredible that the mere statement of account would shew that. That the auditor has such a power is implied from s. 8 of the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91).

[*Sir R. Finlay, K.C.* That section does not apply.]

It has always been assumed that it does apply, and that has been the view acted upon by the Local Government Board and its predecessors for the last sixty years. It is suggested that the Local Government Board might order an inquiry in cases of difficulty, but they have no such power except by way of appeal.

Cur. adv. vult.

Dec. 20. COZENS-HARDY M.R. This is an appeal by the auditor duly appointed to audit the accounts of the council of the city of Westminster against an order of the Divisional Court directing that a writ of certiorari should issue, and ordering that certain disallowances and surcharges made by the auditor should be quashed.

The first question which arises is as to the extent of the jurisdiction of the Court on an application of this nature. In the Divisional Court evidence was given on both sides, and the merits were investigated. In my opinion this was correct.

(1) 51 J. P. 645. (2) [1903] 2 I. R. 141.

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Jurisdiction is conferred upon the Court by s. 247, sub-s. 8, of the Public Health Act, 1875, which refers to s. 35 of the Poor Law Amendment Act, 1844. The words in that section are: "If it appears to such Court that the decision of the said auditor was *erroneous*." Now, apart from authority, I see no reason for limiting these words to error in point of law as distinguished from error in fact. There is, however, authority that the words ought not to be so limited. In *Reg.* v. *Haslehurst* (1) Mathew and Cave JJ. expressly so decided, and the same view was recently taken in the Court of Appeal in Ireland in *Rex* v. *More O'Ferrall.* (2) In my opinion the Divisional Court properly considered the merits, and this point made by the appellant fails.

The next question is as to the nature and extent of the power and duties of the auditor. This depends mainly upon s. 247 of the Public Health Act, 1875, sub-s. 7, which I will read. [The Master of the Rolls read the sub-section.] Now it is plain that under the first limb of that sub-section the auditor is bound to disallow every item of account contrary to law, and that he may "surcharge the person who authorizes the making of the illegal payment," although he has not himself made it. Strictly speaking, such a person would not be a person bringing in an account subject to audit and therefore liable to be surcharged in such account. But I think "surcharge" is used in a less technical sense and is equivalent to "charge"; and this enables me to reach the conclusion that the words "any person accounting" in the second limb of the sub-section are wide enough to include any member of the local authority whose accounts are before the auditor. Sect. 250, which relates to accounts of officers or assistants of any local authority who are required to receive moneys or goods on behalf of the authority, supports this view. Now the power and the duty of the auditor must be recognized as of the utmost importance for the protection of the ratepayers, and I am not prepared to place a narrow construction upon this sub-section. The statute has enabled an auditor, who, in my opinion, has no power to administer an oath or to

(1) 51 J. P. 645.

(2) [1903] 2 I. R. 141.

subpœna witnesses, and who is not a judicial officer in the ordinary sense, to decide that a member of a local authority has been guilty of negligence or misconduct and to assess the amount of loss incurred thereby. The member whose conduct is thus attacked has, so far as I can ascertain, no power to require the attendance of persons whose statements, though not given under oath, might relieve him from the imputation. Happily, this extraordinary jurisdiction conferred upon the auditor is subject to review in the King's Bench Division, where the merits will be dealt with upon legal evidence. From some passages in the judgments in the Court below it would seem that the functions of the auditor are limited to "probing," and that subsequent and independent proceedings must be taken by the Attorney-General on the relation of a ratepayer to recover the amount lost by negligence or misconduct. I cannot accept this view. I think the auditor can find negligence or misconduct and assess damages which can be recovered by summary proceedings before a magistrate.

I have said that in my opinion the auditor has no power to administer an oath. This was certainly true under the Act of 1844, the language in s. 32 with reference to "negligence or misconduct" being the same as in s. 247 of the Public Health Act, 1875. It has, however, been urged upon us that by s. 16 of the Law of Evidence Act, 1851 (14 & 15 Vict. c. 99), the law has been altered. That section is as follows: "Every Court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively." In my opinion this section does not apply to the auditor or extend his powers. He had not before that Act, and he has not now, authority to "hear, receive, and examine evidence." But whether this view is correct or not, my judgment in the present case would be the same. I may add that no evidence was taken by the auditor in the present case, and I am not aware that any auditor acting under the powers of the Acts to which I have referred has ever assumed the right to administer an oath.

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It remains to deal with the particular cases before us. The respondents are Mr. Ventris, the city engineer, and the members of the highways committee. It is right to state emphatically that no fraud or corruption is even suggested, and that nothing beyond "negligence" is alleged against any of the respondents. The case against the members of the highways committee is this. It was their duty to consider and report upon tenders. Tenders were invited with an express term that the lowest tender need not be accepted. The committee in some few instances reported in favour of a tender considerably higher than the lowest. Their report was submitted to the council, by whom their recommendations were adopted. Loss has been occasioned, as is shewn by the result in subsequent years. The auditor asked the committee why they had recommended the acceptance of these tenders. The committee declined to give their reasons, and the auditor thereupon surcharged them with the amount by which he held the corporation had been the loser by reason of the non-acceptance of the lowest tenders. In my opinion there is no justification for this charge. The members of the committee were admittedly honest in their recommendation, and to find them guilty of negligence because they declined to explain their reasons is equivalent to saying that in this peculiar jurisdiction guilt is to be presumed until innocence is proved. In my opinion there is no evidence to justify the finding of negligence. The case against Mr. Ventris is still weaker. He was charged with negligence in not adequately checking the deliveries of granite, with the result that the finance committee paid too much to the contractor. The auditor assumed, upon an inadequate and irrelevant test, that there had been short deliveries. I am not satisfied that there were any short deliveries; but, however that may be, I am clear that there is no evidence of negligence on the part of Mr. Ventris in reference to it. The other charge against Mr. Ventris relates to the preparation of the forms of tenders and the information furnished to the highways committee. Here again he seems to me to have done his duty, and not to be open to the charge of negligence. I agree with the Divisional Court on the merits, and I think the appeal must be dismissed.

FLETCHER MOULTON L.J. This is an appeal from a writ of certiorari directed by the Court of King's Bench to issue to bring up and quash certain surcharges made by the auditor appointed by the Local Government Board to audit the accounts of the council of the city of Westminster for the year ending March 31, 1906. These surcharges fall into two classes. The first consists of two surcharges on the assistant city engineer, of 158*l.* 17*s.* 6*d.* and 184*l.* 2*s.* 6*d.* respectively, on the ground that he was "responsible by his negligence or misconduct" for such losses. The second class consists of surcharges made on eleven members of the council on the ground that they were "jointly and severally responsible by their negligence or misconduct" for certain deficiencies or losses, "in that they selected for recommendation to the council certain tenders which were not the lowest tenders without recording any reason for their so doing or submitting any explanation in reply to the inquiries made on audit." The applicants for these rules, the present respondents, were the persons so surcharged, and the respondent to whom the rules are addressed is the auditor. Affidavits were filed by all the parties, which set forth the facts of the case and shew incidentally the legal contentions of the respective parties. The legal position taken up by the auditor is certainly a very remarkable one, and raises questions of great public importance. The reasons he gives for the surcharges shew that he claims to have the right to call on any member or officer of the corporation to account for any act done by him as such, and to find him guilty of "negligence or misconduct" (without specifying which), and to amerce him in what he considers suitable sums should he think that the corporation would have benefited by some other course of action than that adopted. This is not confined to questions of account. It is applied to cases in which the members have given advice to the corporation which he considers to have been undesirable and to have led to increase of expenditure. In coming to these conclusions he does not pretend to be bound by rules of evidence or by any other restrictions which govern procedure of a judicial type. Matters that have happened since the date of the alleged offence, and facts of earlier date with which it does not appear that the accused had anything to do, are alike used by him as

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grounds of his decisions. And, finally, counsel on his behalf have strenuously contended that the persons surcharged have no right to have the surcharges reviewed by a Court of law on any question of fact, and that their only remedy is to appeal to the Local Government Board, and that the finding that they have been guilty of "negligence or misconduct" must remain unless that Government department (which, as far as I can see, is not bound to hold any judicial inquiry) sees fit to disagree with the action of the auditor appointed by them.

It is the serious character of these contentions of law that renders this case of so great public importance. The facts are little in dispute, and would in themselves furnish sufficient reason for affirming the decision of the Court below. The grounds upon which the auditor has acted in this case are so slight that, speaking for myself, I should have been content to deal with the appeal on its merits without entering into the important questions of law which have been raised in connection with it. But, in view of the course that the arguments have taken and the views of my brethren, I think it impossible to avoid dealing with these points of law on account of their bearing on the statutory powers and duties of auditors appointed to audit the accounts of municipal bodies. The accounts of the London municipal bodies are audited under the provisions of s. 14 of the London Government Act, 1899, which directs "that they shall be audited in like manner and subject to the same provisions as the accounts of the London County Council," i.e., in the manner provided by the Public Health Act, 1875. The relevant sections for these purposes are ss. 247 and 250, and the auditor, in making these surcharges, purports to be acting under the provisions of s. 247, sub-s. 7, which is as follows: [The Lord Justice read the sub-section.] Sect. 250 makes the same provisions apply to the accounts of officers or assistants of the council who are required to receive money or goods. The right of appeal in case of allowances, disallowances and surcharges is given by sub-s. 8, which incorporates for that purpose the provisions of s. 35 of the Poor Law Amendment Act, 1844.

It will be convenient to deal first with the contention on behalf of the appellant that the superior Courts have no jurisdiction to

review disallowances or surcharges made by an auditor excepting in point of law. The last-mentioned statute provides that persons aggrieved may apply to the Court of Queen's Bench for a writ of certiorari to remove into the said Court the said allowance, disallowance, or surcharge in like manner and subject to the like conditions as are provided in respect of persons suing for writs of certiorari for the removal of orders of justices of the peace; and the Court is to decide the particular matter of complaint, and if it appear to the Court that the decision of the said auditor was erroneous they are by rule of the Court to put the matter right. It was urged on behalf of the auditor that "erroneous" meant erroneous in point of law, and that the section gave no remedial jurisdiction when the auditor had come to an erroneous conclusion in fact. No reasons were given for this limitation of the meaning of the word "erroneous," which is directly contrary to the decision of the Court of Queen's Bench in *Reg.* v. *Haslehurst.* (1) I fully agree with that decision, although I am not satisfied that it is necessary for the purposes of the present case. It is admitted by the appellant that if there was no evidence on which any tribunal could reasonably come to the conclusion to which the auditor has come the superior Courts have a jurisdiction to quash the surcharge, and in my opinion this is the case here.

For convenience' sake I will deal first with the facts of the case, and I will begin with the surcharges upon the assistant engineer, Mr. Ventris. The first surcharge is on the ground that there has been an overcharge to the extent of 410 cubic yards of fine crushed ballast supplied for use by the highway department of the council. This is attributed to the "negligence or misconduct" of Mr. Ventris in failing to institute any system of measuring or of testing the measure of the yards of ballast which the contractor claimed to have delivered and for passing for payment and certifying as verified invoices of this material which were 410 cubic yards in excess of the amount actually delivered.

This supposed deficiency is based entirely on a blunder of the auditor himself. The history of this surcharge is as follows:— The ballast in question was fine shingle for use on the roads

(1) 51 J. P. 645.

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in slippery weather, and, as might naturally be expected, it was directed to be delivered partly at the depots of the council and partly at receptacles in the streets distributed over the whole area of the borough. The uncontradicted facts set out in the affidavit of Mr. Ventris on which the rule was moved shew that a careful system of checking delivery of this ballast was regularly observed. It was a system that had been in use by the council since the creation of the highways department, and was the same as that employed by their predecessors, the Strand Board of Works, for some twenty years previously. It is fully described in the affidavit of Mr. Ventris, and we have seen the vouchers and other documents by which it was carried out. So far as I can ascertain from the materials before the Court, the auditor took no steps to ascertain what system of checking deliveries actually existed. If he did do so, and was aware of what was actually being done, his omission to point out in what it was defective, either in his reasons for the surcharge or in his evidence on the rule, was quite unjustifiable. But what he did was of his own proper motion to get the weight of a cubic yard of the shingle used by the council at the date of his audit, and to compare it with the weight of a certain number of cartloads delivered during the year to which the audit related—a cartload being taken in practice as representing one and a quarter cubic yards. At the time of his audit the council were using a different material from that used during the period to which the accounts referred, and it was pointed out to him that, as he was comparing the weights of materials produced by different processes, no trustworthy conclusions could be drawn from the results. Being ignorant of such matters, he persisted in making the comparison, and, having arrived at the conclusion that the deliveries in the depot should have weighed 8 per cent. more than they actually did, he thereupon surcharged the assistant engineer 8 per cent. of the total price paid for all the ballast used on the highways during the whole year, on the ground that this loss had been sustained through the negligence or misconduct of Mr. Ventris. When the matter came before the King's Bench evidence was given of the weight of an accurately measured cubic yard of the actual material contracted for and delivered,

and its weight was found to differ by only about two parts in one thousand from the storekeeper's weights of the cartloads actually delivered. Even the evidence filed in answer on behalf of the auditor admitted that a cubic yard of the material in question weighed 6 per cent. less than that with which he had compared it, so that on his own evidence the deficiency should have been 2 per cent. instead of 8 per cent. Nevertheless the full surcharge was insisted upon, both in the Court below and before us. In my opinion the auditor had before him no evidence of deficiency of delivery or of negligence or misconduct on which any reasonable man could have come to the conclusion that the assistant engineer was in default.

The second of the surcharges on the engineer was, if possible, still more baseless. It appears that the form upon which tenders for ballast and shingle and sand were to be made was settled in the year 1904 by a joint committee of the highways and works committees of the council. The assistant surveyor, in the performance of his duties, invited tenders on these forms for the years 1904-5 and 1905-6, the only difference being that in the latter tender an additional material was included which had recently come into use by the council. The "negligence or misconduct" of the assistant engineer, in respect of which the second surcharge is made, is for using these forms of tender, the reason assigned being that they included other materials than the one material which was as a fact exclusively used by the council during the ensuing year because it was found to answer their purpose best. For the crime of asking for quotations for materials for which in fact it was not found necessary to give orders (although, according to the uncontradicted evidence, all of them might have been so required), the auditor has surcharged the assistant engineer a sum of 9*d.* per cubic yard for every yard of ballast used by the council during the year. This figure appears to have been adopted by the auditor as the measure of his surcharge because he considered that the council would have done better to have accepted the lowest tender for this article, instead of the tender which in fact they did accept. There is not the faintest trace of evidence of any connection between the form of tender and the selection

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by the highway committee of the particular contractor, nor, so far as I can see, is there any evidence that the assistant engineer had anything to do with the choice of the tender accepted other than that he had, by permission of the council, used the particular material ordered for some months and had found it specially adapted to the purpose. Here, again, there was no evidence whatever on which any reasonable person could come to the conclusion that there was either "negligence or misconduct," or could find that any loss had come to the council by reason of any default on the part of the assistant engineer.

The facts on which the surcharges upon the eleven individual members of the corporation are based may be stated very simply. These persons constitute the committee which has special charge of the highways department. This committee is purely an administrative and advisory committee. It has no function of spending money, nor has it any accounts. The contracts for the materials it requires for the work under its charge are made by the council itself, and are managed by its officers. But, as a matter of course, when tenders are required for materials for the work which they have under their charge these tenders are sent into and examined by them, and they give their advice as to which should be accepted. The only "negligence or misconduct" on which the auditor bases the surcharges he has made is that the tenders which these gentlemen have advised the council to accept in certain instances were not the lowest tenders.

It is so obvious that the acceptance of the lowest tender is only a matter of discretion, and that often it is wiser to accept a tender that is not the lowest, that I pointed out to counsel for the auditor that this complaint, if it meant anything, must be intended to be a charge of corruption. This was met with an indignant repudiation on his part, so that I must assume that the "negligence or misconduct" alleged is of some other kind. It is impossible to gather from the report of the auditor to the council, or the form of the surcharge, what is intended, but whatever it be there is nothing of any kind suggested which could be evidence against these individual members of the council apart from the fact that the auditor considers that they ought to

have accepted the lowest tender in all cases. The real gravamen of the charge by the auditor evidently is that they refused to attend before him and defend themselves against his charges, contenting themselves with stating that they acted bona fide and exercised their discretion to the best of their ability—a statement which they have now put on oath in the affidavits before us. In my opinion they were justified in the course they took, and the surcharge was entirely without justification. It is clear from his report, and the reasons given by him for the surcharges, that the auditor considered himself entitled to act with entire disregard of the rules of evidence, and to condemn on mere suspicion without reasonable grounds even for such suspicion, and that he considered it was incumbent on those he accused to prove their innocence to his satisfaction instead of his requiring proof before he found them guilty. This is wholly contrary to the principles of English law, and these surcharges cannot be supported, as there was no evidence on which any reasonable man could find that the alleged losses were due to any "negligence or misconduct" on the part of the persons surcharged.

I will now pass on to consider the important question of the statutory duties and powers of the auditor. These are defined by s. 247, sub-s. 7, of the Public Health Act, 1875, which reads as follows: [The Lord Justice read the sub-section.] The first part of the sub-section deals only with illegal payments, i.e., such as are ultra vires. They are to be surcharged on the person making or authorizing the making of the payment. It is clear that persons answering to either of these descriptions must necessarily be persons who are before the auditor in his capacity as such, and must be persons who either have had money of the corporation for which they must properly account, or have had control of funds of the corporation which they have had authority to pay away, and for the proper expenditure of which they have therefore to account. There is, therefore, no difficulty in construing the language of this part of the section. The auditor must surcharge the illegal payment on the person offending either by disallowing it from the credits claimed by him or by increasing the debits admitted by him.

The critical provision in this case is that which immediately

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follows, and relates to "the amount of any deficiency or loss incurred by the negligence or misconduct" of a person accounting. It will be seen that the language here is changed. The power and duty to charge this deficiency or loss is limited to the case of a "person accounting." The meaning of the language is to my mind clear. If a person who brings up accounts for audit and must get them passed by the auditor admits the receipt of items which would have been greater, or claims credit for payments which need not have been paid, but for his own negligence or misconduct, he will not be allowed so to do, but he will be surcharged in those accounts with the amount of such deficiency or loss. He will be taken to have received what, but for his own default, he would actually have received, and he will only be taken to have paid away that which, but for his own default, he would have paid away. This corresponds exactly with the next provision, which deals with the case of sums which ought to have been brought into account by the person accounting, but have not been so brought into account. The persons, the occasion, and the operations to which the provisions refer are clearly pointed out by the language chosen, and are the same throughout. The persons are the auditor and the one who has to submit his accounts to him for audit. The occasion is the examination of those accounts to put them into the shape in which they ought legally to stand. And the operations directed are the amendment of the accounts by alteration or insertion of items in those accounts so as to protect the public against the person accounting, throwing on them the burden of losses due to his default or reaping the advantage of sums improperly omitted from the account. In all cases the auditor is acting strictly as an auditor and nothing more, and the subject-matter of his decisions is items which are, or ought to be, in the accounts before him.

To contrast this with the contentions of the appellant, let me take the case of the assistant engineer. He is the servant of the council, and more particularly under the directions of the highways board. He does that which they instruct him to do, and he performs all his functions to the satisfaction of these his masters. They know the staff which is allowed him and the duties which he and his subordinates have to perform, and with

full knowledge of all this they are satisfied that he is diligently serving them. No action for negligence will lie against him at law. But it is alleged that under this auditing section a lay tribunal termed an auditor has the right to try him for negligence and assess damages against him if the auditor thinks that, had he arranged the duties of his staff differently, or had he employed extra men in a certain way—a thing which he would have no power to do without the permission of his masters—a saving would have been effected greater than the extra cost incurred. Or take the second surcharge against him. He is directed by his masters to obtain tenders in a certain form, and he obeys them. The auditor claims a right to say, "Had you obtained tenders in a different form your masters might have made a wiser choice, and you must pay as damages such sum as I assess." In my opinion all this is beyond the jurisdiction of the auditor. His duty is to examine, correct, and pass such accounts, if any, as the assistant engineer has to bring before him, and that is all. He has no jurisdiction to pass judgment on the diligence or wisdom of an employee of the council any more than he has to pass judgment on his sobriety. The employee is responsible for such things to his employers alone, and if they are satisfied no one can interfere.

The case of the surcharges upon the members of the highways committee is to my mind even stronger from a legal point of view. The assistant engineer might come under s. 250, and be a party accounting, if in fact he had any accounts to bring in. But to my mind it is impossible to call an individual corporator as such a "person accounting." He brings in no accounts, and no money of the corporation passes through his hands. The corporation is the person accounting, and any person or persons to whom are delegated duties which include the receipt and disbursement of moneys for specific purposes will become thereby "persons accounting," because they personally have to bring in accounts which must be put into right form by the auditor. I do not pretend that these categories exhaust the possible ways in which an individual corporator may become a person accounting, but to my mind he certainly does not become in his personal capacity subject to the jurisdiction of the auditor, and liable to be directly charged by

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him, merely because he is a corporator. He may well become liable in respect of deficiencies due to the surcharges or disallowances made by the auditor in the accounts brought in by the corporation, but if so his liability must be established (as between himself and the corporation that has been surcharged) by the ordinary processes of law. The auditor has neither the power nor the jurisdiction to hold an inquiry as to which of the individual corporators are to be visited with the consequences of what he deems to be an act of negligence on the part of the corporation. In the present case it is proved that the practice is for the full list of tenders to lie in the council chamber, and to be sent to such members as desire it before the acceptance of any tender is discussed in the council, so that the same material on which these particular corporators had to decide was at the disposal of all the members of the corporation. Can it be suggested that an auditor with no power of inquiring into what passed at a meeting of the corporation is to inflict such damages on such individual corporators as he may think fit if he considers that the corporation has acted unwisely, and that they should have kept it from doing so?

In adopting this interpretation of the section we give, in my opinion, full meaning to every word there employed. Indeed, every word seems to me to be necessary and suitable to the intention that there should be an effective audit in the true sense of the word. But I can find nothing that goes farther. It is inconceivable to me that the Legislature should have intended to set up a general Court of Conduct with the widest jurisdiction and well nigh unlimited powers by these simple, and I might almost say meagre, provisions. They are ample and adequate if one takes them as relating to an audit properly so called, for the word connotes so much, and is itself so definite, that a few empowering or limiting words are adequate to fix the exact nature of the audit intended. But if they are intended to institute a Court with power of inquiry not limited to examining and rectifying accounts brought before it, but possessing general powers to make charges of negligence or misconduct against any one connected with the corporation either as corporator or employee (and the contention of the appellant must go so far as this), and

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to try these charges and assess damages in respect of them, they are wholly inadequate. Had the Legislature intended any such thing it must have defined exactly these powers and the procedure to be followed in the exercise of them, even if (which I do not believe) it would have consented to entrust them to a non-judicial authority at all. There is the widest difference between refusing to pass accounts with which the auditor is not satisfied and treating him as a Court that can inquire into the behaviour of individuals and the consequences thereof, and penalize them in damages if he disapproves of it. I cannot import into the section any such artificial and illusory limitations as that his powers go to criticizing "administration, but not policy." There is nothing in the section as it stands that indicates or supports such a distinction, and we are not legislators. Nor can I see any clear distinction between the two. Is a practice of keeping to contractors whom you have tried and found to serve you well, instead of leaving them for untried firms who tender at a slightly lower rate, a matter of policy or administration? If the Legislature were so unwise as to enact that a distinction so expressed should limit the jurisdiction of the auditor, it would be our duty to interpret the words as best we could. But it has not done so, and I decline to be a party to reading into a section artificial limitations not to be found therein for the purpose of basing on them a discussion as to which side of this unauthorized line of delimitation a particular act may come.

I have not referred as yet to the other sub-sections of s. 247. When examined they all to my mind support the view that the operation to be performed is accurately described by the term "audit," and that it does not extend to or comprise any general inquiry into the conduct of the individual corporators or the employees of the corporation. Sub-s. 1 provides that "the accounts of the receipts and expenditure" of the authority are to be audited and examined annually. Sub-s. 4 provides that "a copy of the accounts duly made up and balanced, together with all rate books account books deeds contracts accounts vouchers and receipts mentioned or referred to in such accounts," are to be deposited in the office of the authority and be open to inspection; and sub-s. 3 provides for due advertisement of such deposit of

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accounts. Sub-s. 5 gives the necessary powers to enable the auditor to conduct the audit effectively. It has an important bearing on the particular point now under consideration, for, while it with great particularity prescribes that the auditor may call for the production of such books and papers as he may deem necessary and provides penalties for disobedience, it does not give any power to make inquiries or to compel explanations to be given to him. I do not for one moment mean to imply from this omission that the auditor would not have the ordinary authority of an auditor to require assistance by way of explanation to be given him by those submitting their accounts to him, but it is very strong evidence that there was no intention on the part of the Legislature to confer upon him any extraordinary powers in this respect. Sub-s. 6 seems to me to bear specially on this matter. Under its provisions any ratepayer may be present at the audit, and may make any objection to the accounts before the auditor, and if aggrieved by his decision he may by the combined operation of sub-ss. 6 and 8 appeal either to the Court of Queen's Bench or to the Local Government Board whether in respect of allowances, disallowances, or surcharges. If, therefore, the auditor has the power to examine into charges of misconduct generally, and assess damages in respect of them, any ratepayer can bring before the auditor charges of negligence and misconduct against any individual corporator or employee of the corporation in respect of any conduct in connection with the discharge of his duties, and if unsuccessful may appeal to the Local Government Board. If he is there successful, the unfortunate individual whom he has accused will have been found guilty of negligence or misconduct without ever having had his case heard by any Court of law. I cannot believe that this can have been the intention of the statute, nor, as I have said, can I find any words which, if taken in their natural meaning, indicate it. From beginning to end there are to my mind no words which do otherwise than support the view that an audit only is contemplated, and the whole language and structure of the sub-sections to my mind negative the idea of any such appellate jurisdiction over the whole of the acts of corporators and their servants as is here claimed by the auditor.

A very strong appeal was made to our sympathies by the counsel for the appellant, on the ground that it was important to protect ratepayers from misconduct on the part of their representatives. No one feels more keenly than I do the dangers of municipal corruption. I consider that it is one of the most important and pressing questions of the day to secure the proper performance of their duties by municipalities. But it must be done in the way prescribed by the law. Just as our abhorrence of crimes of violence is no excuse for lynching, so the indignation we feel at municipal corruption and our appreciation of its danger do not justify our straining the meaning of the law to create what we may fancy would be an effective remedy. And, speaking for myself, I am of opinion that the interpretation of the sub-section contended for by the respondents, and which I hold to be its natural meaning, is likely to furnish a more efficient remedy than if we were to hold that it gives the extravagant powers to the auditor contended for by the appellant. The true mode of securing the good management of municipal affairs is to induce the best men to take part in them, and to give their services to the community in this way. The task is at best unremunerative, and often thankless; but if those who accept it are to be liable to have their conduct pronounced upon and their character and property injured by decisions, not of any of the Courts of law of the country, to which they are of course amenable, but of a special tribunal consisting of an official chosen by a Government department without any powers or qualifications for holding a judicial inquiry, and discharging these functions without any of the securities which protect the individual before our Courts, and if the jurisdiction of that individual is not to be limited to requiring an account of municipal money for which the accused has made himself responsible, but extends to calling him to account for the reasons and motives of all his actions, no self-respecting man will take part in municipal affairs. The circumstances of the present case illustrate what might be the consequences, but I must not be supposed to base my opinions in this respect on the conduct of this particular audit. But it is fair to use the incidents of this case as indicating the abuses to which the institution of such a tribunal would give rise, and to

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my mind there is nothing in the present case which might not be expected to occur in future, though perhaps to a less extent.

I wish to add that I do not agree with the view that a properly conducted independent audit offers but slight protection to the ratepayers. It is unquestionably within the powers of an auditor, and indeed it is his duty should the occasion render it desirable, to report fully on any matters which in his opinion ought to be called to the attention of the corporation, and if this duty is adequately performed it offers a most efficient safeguard against improper practices. The responsibility of acting upon such report must, of course, remain with the corporation; but the individuals forming it change from time to time, and we have no right to assume that, even if for a time there is a disposition to hush up derelictions of duty, such a state of things will continue, especially when the corporation is affected with formal notice of the circumstances by a report of a public auditor.

For these reasons I am of opinion that the judgment of the Divisional Court was right, and that this appeal should be dismissed.

FARWELL L.J. I agree that on the particular facts of the several matters before us no sufficient case is made out against any of the respondents.

I also agree that the remedy of certiorari is not confined to error in law, but extends also to error in fact, as was decided by Mathew and Cave JJ. in *Reg.* v. *Haslehurst* (1), and by the Divisional Court in this case. This latter point has a material bearing, to my mind, on the general question that I have now to deal with, as it would be a strong thing to make the auditor free from appeal to any Court of law, and subject only to the Local Government Board, in matters involving the credit and reputation, as well as the money, of any of His Majesty's subjects.

The main question is one of the greatest importance, and it is necessary for us to express an opinion upon it in consequence of the pronouncement at the end of the judgment of the Lord Chief Justice in the Divisional Court as an instruction and warning to all auditors under the Local Government Act. The

(1) 51 J. P. 645.

auditor's contention is that he is not merely to audit figures, but is to act to some extent in a judicial capacity, and is to inquire for the purposes and to the extent necessary to give effect to s. 247 of the Public Health Act, 1875, into the conduct of the accounting parties, and to hear and determine cases of illegality, negligence, and misconduct in relation to the accounts, and for this purpose to require accounting parties to give explanations and evidence. The respondents deny that he is entitled to do anything beyond auditing in the strict sense, and say that he must accept such answers as the accounting parties think fit. The auditor does not claim, nor could he (in my opinion) properly claim, to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration. The distinction is one which I have reason to believe is quite well understood in the audit by the Comptroller and Auditor-General of War Office accounts.

For the purpose of elucidating my opinion I propose to take one of the charges in the present case as an illustration. The auditor found that the highest instead of lower tenders had been accepted, and asked the reason and was told that the committee thought it best, and they declined to answer further. No one, of course, would say that the lowest tender must or ought necessarily to be accepted, but Sir R. Finlay pushed his contention to the extent that if one tender for the same material was five times greater than any other the auditor must bow to their decision without more. In my opinion it is plain that this is a matter of administration, not of policy; it is enough to refer to the Poor Law Commissioners' directions to "churchwardens and overseers and other officers required to account for the expenditure of the poor rates" issued in 1836, and set out in Burn's Justice of the Peace, 30th ed. vol. 4, p. 1105, where it is stated that "the general rule is, that all charges are exorbitant, on which

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the overseers have paid any person for goods or services at a higher rate than such goods or services were offered by any other competent person, or than they might be obtained for by a private individual resident within the same district," and I am of opinion that the respondents' contention cannot be sustained for the following reasons.

The metropolitan boroughs, of which the Westminster Council is one, were formed by the London Government Act, 1899 (62 & 63 Vict. c. 14), with very large powers, and with duties involving the raising and expenditure of very large sums of money. By s. 9 the treasurer is to receive and pay all payments to and by the council in pursuance of an order of the council signed by three members of the finance committee and countersigned by the town clerk. The mere money accounts of the council would therefore be the treasurer's accounts; but, as it was apparent that the real responsibility is with those members of the council who order or recommend such payments, and that the council must necessarily act by committees who would themselves be guided by officials, s. 14 provides that the accounts of the council, *and* of every committee and of their officers, shall be audited in like manner and subject to the same provisions as the accounts of the London County Council. The audit of the accounts of the London County Council is regulated by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71, and I think it is important to observe that, while by sub-s. 2 of that section the provisions of the Municipal Corporations Act, 1882, with respect to the return of accounts to the Local Government Board and to the inspection and abstract thereof are applied to the council, the provisions as to audit are not, but the much more extensive provisions of the Public Health Act, 1875, are made applicable to such audit. Now the Municipal Corporations Act, 1882, provides by s. 27 that the treasurer shall within one month from the date to which he is required to make up his accounts in each half-year submit them, with the necessary vouchers and papers, to the borough auditors, and they shall audit them. This is a singularly ineffective and even futile provision, as I had occasion to observe in *Attorney-General* v. *de Winton*.(1) But

(1) [1906] 2 Ch. 106, 119.

even under this Act the duties of the auditor were thus explained by the late Lord Russell C.J. in *Thomas* v. *Devonport Corporation*. (1) He said: "I do not subscribe to the doctrine that his sole duty is to see whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority."

Now, if one compares these words of the late Lord Chief Justice on the Municipal Corporations Act auditors with those used by the present Lord Chief Justice in the present case, it is apparent that the latter attributes no more power or duty to an auditor under the Public Health Act than an auditor had under the Municipal Corporations Act. But, when one turns to consider s. 247 of the Public Health Act, it is quite impossible that the Legislature can have intended to adopt an audit in effect the same as the Municipal Corporations audit while deliberately preferring the Public Health Act clauses, and a closer consideration of that section has convinced me that the auditor's contention is correct.

I think that the term "auditor" is unfortunate; it leads the mind to the idea of a company's auditor, whose business is to ascertain and state the true financial position of the company at the time of the audit and nothing more: see Lord Lindley's judgment in *In re London and General Bank*. (2) But the auditors of the council are appointed by the Local Government Board, not by the council, nor are they elective, as are the auditors

(1) [1900] 1 Q. B. 16, at p. 21. (2) [1895] 2 Ch. 673.

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under the Municipal Corporations Act. They are outside officials appointed by a Government office to perform the duties set forth in s. 247 of the Public Health Act—an Act which created a large number of elected bodies, consisting of all sorts and conditions of men; I say it without meaning to give offence to any one, but in answer to Sir R. Finlay's argument that no one in the position of a county councillor would submit to the indignity of having his conduct called in question by an auditor. The Legislature has adopted a mode of audit created to meet the case of bodies, many of whom would not have such sensitive feelings, and whose position (whatever their feelings or amour propre might be) rendered it essential that at least as great a check should be kept on them as on poor law guardians and others. I put aside the argument that the Legislature cannot have intended to mistrust the councillors, and I consider s. 247 from the point of view that it has been chosen as appropriate to these councils rather than the audit under the Municipal Corporations Act, and that the auditor is appointed by the Local Government Board, and is therefore presumably chosen for his fitness to perform the duties pointed out by the section, and is not necessarily the mere accountant that Sir R. Finlay would seek to make him out. He is in this case a barrister.

Under s. 247, sub-ss. 3, 4, 5 and 6, the audit is public, and is advertised; all the books, vouchers, &c., are deposited and open to inspection; the auditor may by summons in writing require production of all documents, and may also require the person accountable therefor to sign a declaration as to their correctness under a penalty of 40*s.*; and a false declaration is made wilful and corrupt perjury. Down to this point the powers of the auditor largely exceed those of any other sort of auditor; but sub-ss. 6 and 7 appear to me conclusive to shew that the auditor has functions of a judicial nature to perform. Under sub-s. 6 any ratepayer may be present at the audit, and may make *any* objection to such accounts before the auditor, and such ratepayer has a right of appeal under sub-s. 8 against allowances and disallowances by the auditor. Under sub-s. 7 the auditor "*shall* disallow every item of account contrary to law, and surcharge

the same on the person making *or authorizing the making of* the illegal payment, and *shall charge* against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and *shall* in every such case *certify the amount due from such person*, and on application by any party aggrieved shall state in writing the reasons *for his decision* in respect of such disallowance or surcharge, and also of any allowance which he may have made."

Now take the case of the acceptance of a tender five times larger than any other. The total sum paid to the tenderer appears in the accounts; it is clear that any ratepayer can object, and he may put his objection on the ground of negligence or misconduct. The words are "may make *any* objection to such accounts." It is clear, also, that the auditor is to decide, for an appeal is given from his decision, and this applies to questions of law such as ultra vires. But the auditor is not confined to cases where a ratepayer objects; his duty is to look into things for himself. It is admitted that he must decide questions of law as best he can for himself under the direction that he "*shall disallow* every item contrary to law"; but it is said that he cannot deal with questions of negligence or misconduct. But the section says that he "*shall* charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person." It is clear, therefore, that he must, on the ordinary principles of justice, hear the parties and must decide the question. I do not suppose that in the vast majority of cases evidence on oath would be required; but, if it were, I am of opinion that the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16, applies.

In my opinion the contention of the respondents that the auditor is bound to accept their statement that they acted in good faith as conclusive is unsustainable. Honest intentions are no answer to a charge of negligence, and I am glad to find myself fortified by the high authority of the Court of Appeal in Ireland in my opinion that he is entitled, and indeed bound, to call for evidence when in his discretion he thinks it his duty:

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Rex v. *More O'Ferrall.* (1) Then it is said that the members of the committee who authorized or recommended the expenditure are not liable because they are not "persons accounting." I have already pointed out that s. 14 of the Act of 1899 explicitly deals with the accounts of committees, but to my mind this sub-s. 7 is clear. "The person accounting" refers back to the line before, "the person making *or authorizing* the making of" the payment, shewing that "accounting" is not confined to figures submitted to audit, but extends to conduct for which any committee or officer is liable to be called to account.

It is further to be observed that, if the auditor has not the powers which in my opinion the Act clearly gives him of hearing and deciding on all matters of administration, there is no provision made for any other remedy in respect of the illegality, misconduct or negligence mentioned in the Act. No provision is made for any report by the auditor to the Local Government Board, nor are any powers given to the Local Government Board except by way of appeal from the auditor's decision. The respondents' contention, therefore, would leave the ratepayers to such remedy as, by risking their own money as relators, they could obtain by persuading the Attorney-General to bring an action; and this would be obviously impossible in the vast majority of small cases where the auditor can quickly discover and dispose of objections, but which would not be worth an expensive suit. I fail to see how the auditor can discharge the duties put upon him by sub-s. 7, unless he hears and determines the questions of illegality, negligence and misconduct mentioned in the sub-section in the only way consonant with the elementary principles of justice, viz., after hearing the evidence and the arguments of the parties.

Although I am of opinion that the respondents were wrong in refusing to give any explanation, it does not follow that the auditor ought in every case where they so refuse to surcharge them; he ought, in my opinion, to consider the facts as a jury would be directed to do in an action of negligence or misconduct where the defendant did not appear, and if such facts are sufficient to justify a verdict against the defendant, then, and then

(1) [1903] 2 I. R. 141.

only, should he surcharge. I cannot regard the surcharge as a penalty for neglect or refusal to explain, but as a legal consequence of acts or defaults sufficient to justify a verdict.

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Appeal dismissed.

Solicitors: *Last & Sons; Allen & Son.*

H. B. H.

[IN THE COURT OF APPEAL.]

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PERRY *v.* WRIGHT.

CAIN *v.* FREDERICK LEYLAND & CO. (1900), LIMITED.

BAILEY *v.* G. H. KENWORTHY, LIMITED.

GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LIMITED.

Employer and Workman—Compensation—Basis of Calculation—"Average Weekly Earnings"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched.* I., *ss.* 1, 2.

In estimating the average weekly earnings under s. 2 (*a*) of Sched. I. of the Workmen's Compensation Act, 1906, the object should be to arrive at the *normal* rate of remuneration of the injured man at the date of the accident; and where exact computation is impracticable, the Court for its guidance *may* have regard to the average weekly amount earned during the previous twelve months by a person in the same grade employed by the same employer, or, failing that, in the same class of employment in the same district.

"Grade" refers to the particular rank in the industrial hierarchy occupied by the workman, and not to his greater or less excellence in that rank; it is a question of fact whether there is a grade to which the workman belongs.

The Court, having found that the workman has a grade, is not bound to adopt the average wages in that grade as the basis of compensation, but may take into consideration the personal capacity of the workman.

In an ordinary case the average weekly earnings are to be calculated by dividing the total earnings of the workman during the relevant period, not by the number of weeks in that period, but by the number of weeks actually worked within that period; days in which no work

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is done and no wages are earned are to be disregarded. But this principle does not apply to cases under s. 1 (*a*) (i.) of the First Schedule.

Per Fletcher Moulton L.J.: The principle does not apply to cases where the limitation upon the time worked arises from the nature of the employment itself, e.g., the case of a charwoman, where a certain amount of discontinuity is an incident of the employment.

In determining whether there has been any change of employment, "employment by the same employer," for the purpose of the First Schedule, means employment in the same grade, and any step up or down from one grade to another is to be regarded as constituting a fresh employment; but in calculating any of the periods mentioned in s. 1 of the schedule absence due to illness or to causes beyond the control of the workman is to be disregarded, and the employment is to be reckoned as continuous.

A collier, who had partially recovered from an accident for which he was receiving compensation, was offered and accepted light employment under a registered agreement with his employers upon the terms of his submitting to a reduction in the rate of compensation. Six months later he met with a fatal accident in the course of such employment. Upon an application by the widow for compensation under the Workmen's Compensation Act, 1906:—

Held, that compensation ought to be calculated solely on the basis of the earnings of the deceased from the light employment without taking into account the compensation he received under the agreement.

THESE appeals raised questions as to the scale of compensation payable to a workman or his dependants under the Workmen's Compensation Act, 1906, Sched. I., ss. 1 and 2. (1)

(1) The following are the material portions of the sections:—"First Schedule.—Scale and conditions of compensation.—(1.) The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) If the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer;" [Clauses (ii.) and (iii.) of s. 1 (*a*) are not material.] "(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings

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Appeal from an award of the county court judge of Liverpool.

The applicant Perry was a casual dock labourer at Liverpool. The respondent Wright was a master stevedore. On July 24, 1907, Perry met with an accident while working for Wright on the steamship *Pegue* in the Alfred Dock, Seacombe. Perry had only worked two days for Wright at the date of the accident. He had no regular employment, but worked some days for one firm and some days for another, just as a job turned up.

The learned county court judge found that it was "impracticable" to compute the rate of remuneration, and that among dock labourers there were "no definite grades," but that the men formed themselves into grades of good and bad, the former earning on an average 30*s.* per week, and the latter about 15*s.* per week. He also found that Perry was a man of poor physique owing to drink and did not stick to his work, and that he ought to be placed in the grade of a bad workman, i.e., a workman earning 15*s.* per week, and he made an award on that footing.

Perry appealed. The appeal was heard on November 27, 1907.

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during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound:" [Then follows a proviso not material to the present case.] "(2.) For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district . . . . (*c*) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause;"

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Horridge, K.C., and *F. Cuthbert-Smith*, for the appellant. The county court judge has found upon the evidence that there are no definite "grades" among casual dock labourers, but he has himself established two grades of such workmen—good and bad [illegible] placed the appellant in the second. There is nothing 2 (*a*) of Sched. I. to the Act to justify this. The appellant [illegible]ntitled to have compensation awarded on the basis of the standard wages paid to casual doc[illegible]ourers in the district. [They referred to *Bartlett* v. *Sut[illegible] & Sons* (1); *Ayres* v. *Buckeridge* (2); *Jones* v. *Ocean Coa[illegible]o.* (3); *Giles* v. *Belford Smith.* (4)]

Leslie Scott, for the respondent. The county court judge has rightly interpreted the meaning of the word "grade" in the section. It is not a term of art, but a word of broad meaning. It does not merely refer to the particular rank of the workman in the hierarchy of labour, and the county court judge was justified in referring it to the standard of excellence or efficiency of the workman himself. Any other interpretation would result in an incompetent, unsatisfactory workman of poor physique, who had only been employed for an hour or so, being awarded the same rate of compensation as a good worker who had been regularly employed.

Horridge, K.C., replied.

Cur. adv. vult.

CAIN *v.* FREDERICK LEYLAND & Co. (1900), LIMITED.

Appeal from an award of the county court judge of Liverpool.

Cain was a casual shipwright at Liverpool. On August 6, 1907, he met with a fatal accident while working for the respondents upon the steamship *Atlantian*. He had only begun to work for the respondents on that morning, though he had from time to time worked for the respondents as a casual hand. The respondents had in their employment casual hands and regular hands. The standard union rate of wages for shipwrights, whether casual or regular, was 7*s.* per day, with extra pay for overtime.

Upon an application by Cain's widow for compensation, the

(1) [1902] 1 K. B. 72
(2) [1902] 1 K. B. 57, at p. 65.
(3) [1899] 2 Q. B. 124.
(4) [1903] 1 K B. 843.

learned county court judge found that it was impracticable to compute the rate of remuneration, and that regard must be had to s. 2 (*a*) of the schedule; that a casual shipwright was not in the same grade as a regular shipwright, and that the earnings of the former were much less than the earnings of the [illegible] and he continued as follows: "The evidence shewed that casual shipwrights might be divided into different classes, the good workman and the man whom I may call, for the purposes of this case, an indifferent workman; the former earning on an average about 2*l.* 2*s.* per week, and the latter from 16*s.* to 20*s.* per week, the mean of which I place at 18*s.* per week. The mean between the figures 2*l.* 2*s.* and 18*s.* per week, namely, 1*l.* 10*s.*, I find to be the average weekly amount which during the twelve months previous to the accident was being earned by what I may call an average good shipwright casually employed in the same district as the deceased. The deceased, though fifty-six years of age and recently somewhat failing in his work, was an average good shipwright, and earning, as I find, the average weekly earnings of 30*s.* Upon this basis, in my opinion, the compensation to which the applicants are entitled is 156 times 30*s.*, namely, 234*l.*"

The employers appealed from this award, and there was also a cross-appeal by the applicant, who claimed to be entitled to the full amount of 300*l.* allowed by s. 1 (*a*) of the schedule. These appeals were heard on November 27 and 28.

Egerton Stewart-Brown, for the employers. The question is what were the average weekly earnings of the workman in the employment of the appellants. The county court judge was not entitled, in computing these average weekly earnings, to take into account the casual earnings of the workman while working for other employers: *Hathaway* v. *Argus Printing Co., Ld.* (1) The whole theory of the Acts is based upon the nexus between the employer and the workman. He ought to have confined himself to the average weekly earnings of the workman in the employment of these employers. The result is that his award is excessive. The word "grade" was first used in the Employers'

(1) [1901] 1 K. B. 96.

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Liability Act, 1880, s. 3, which provides a limit in respect of the amount of compensation by reference to grade, but there is no reported decision upon it. Sect. 2 (*a*) and (*c*) supports the appellants' view.

[FARWELL L.J. In my opinion the provisions of s. 2 are intended as a guide, not as a fetter, otherwise it would be impossible to apply some of those provisions to the case of casual employment at all.]

As to the cross-appeal, the judge was quite right in treating the man's personal capacity as a factor in the calculation. He has to find the average rate of remuneration per week of *the* workman. Therefore the individual must always be regarded.

C. A. Russell, K.C., and *Greaves Lord*, for the applicant. The object of the Legislature was to clear away the difficulties of construing the phrase "average weekly earnings" used in the Act of 1897, as exemplified by *Price* v. *J. Marsden & Sons* (1), by adding an explanatory clause, s. 2 (*a*). Not only is there here no ground for reducing the figure arrived at by the county court judge, but that figure is not high enough. The evidence shews that there was only one grade of shipwrights in the locality, and that the rate of remuneration per week of a shipwright, whether regular or casual, was two guineas, and there was no circumstance in the case which entitled the judge to depart from that rate. Irregularity is a constant feature of the employment. Further, the county court judge, having got his separate grades of casual and regular, then proceeds to distinguish between the good and the bad. He invents the good average casual. There is no evidence to support that.

Stewart-Brown, in reply. It is contended upon the evidence that the learned judge ought to have found that the wages of the average casual amounted to two guineas per week, but that is a question of fact, as to which the finding of the county court judge is conclusive, provided there is any evidence to support it.

Cur. adv. vult.

BAILEY *v.* G. H. KENWORTHY, LIMITED.

Appeal from an award of the county court judge of Ashton-under-Lyne.

(1) [1899] 1 Q. B. 493.

The applicant Bailey was an operative spinner employed by the respondents in a cotton mill at Ashton-under-Lyne. On July 9, 1907, he met with an accident. He had been in the employment of the respondents in the same capacity for more than twelve months. His actual receipts from the respondents during the twelve months amounted to 83*l.* 2*s.* 1*d.* It appeared that he was paid by the piece, and not by time. In the course of the year there were stoppages—(*a*) by reason of a canal having burst its bank; (*b*) during the "Wakes Week," when all the mills at Ashton were closed; (*c*) by reason of accidents to boiler and machinery; (*d*) on Bank Holidays.

In ascertaining the average weekly earnings of the applicant the learned county court judge divided the 83*l.* 2*s.* 1*d.* by 52, and awarded compensation during the period of incapacity at the rate of 15*s.* 11½*d.*, that being one-half the weekly wage so ascertained.

The applicant appealed. The appeal was heard on November 28, 1907.

S. T. Evans, K.C., and *Adshead Elliott*, for the applicant. The applicant was employed for more than twelve months by the same employer, and he was paid by the piece. During that period there were stoppages amounting in the aggregate to three weeks. They arose—(*a*) from the breaking of the canal banks; (*b*) by the Wakes Week, when no work is going on; (*c*) by the break-down of the machinery; (*d*) by other holidays. These stoppages are included in the words "any other unavoidable cause" over which the workman has no control in s. 2 (*c*) of Sched. I., and therefore, in determining the average weekly earnings of the applicant under the new Act, the total receipts for the year ought to be divided, not by 52, but by 49. The intention of the new Act was to give the go-by to the method of calculation employed by the old Act, and to take the normal rate of the normal week's wages during the time that the man is working. The words of s. 2 are new, and are put in deliberately with the object of preventing the hardships which had arisen under the old Act.

C. A. Russell, K.C., and *Wingate Saul*, for the respondents. The Act speaks of the average weekly earnings for the previous

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twelve months. Therefore you ought to take the normal year, not the normal week. If you adopt the applicant's basis of calculation, then, if you take a year, you are paying him more than he would earn. Here the workman is not being paid at any rate per week but at so much per hank. Such a man, by the conditions of his employment, cannot work for fifty-two weeks, and the problem to be solved is how to reduce to terms of a rate per week the workman's earnings during the previous twelve months. Sect. 2 (*c*) is intended to determine what is a break in the employment, and has nothing to do with the question of the rate of compensation; and it assumes that the work is going on, but that the workman, from illness or unavoidable cause, absents himself from the work. A strike would prevent the employment being one employment. You are not to disregard the limitations on a man's employment which prevent him working the full year by reason of the conditions of the employment. Clause (*c*) does not apply; but the question to be ascertained is, what were the average weekly earnings during the previous twelve months. That is done by dividing by 52, because there is nothing abnormal in this year. There is always liable to be a certain stoppage by the breakdown of machinery in a large mill, and the week's delay caused by the breaking of the canal is not treated by the witnesses as interfering with the normal state of things. This, therefore, was a normal year.

S. T. Evans, K.C., replied.

Cur. adv. vult.

GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LIMITED.

Appeal from an award of the learned county court judge of Merthyr Tydvil.

Gough was a collier employed by the respondents. He met with two accidents, the second of which was fatal. The first occurred on March 28, 1906, and resulted in partial incapacity. The respondents paid compensation at the rate of 15*s.* 8*d.* per week. He got better, though he was never able to perform his old work. On December 12, 1906, he was offered by the respondents and accepted light employment, and a registered agreement was entered into, which, so far as material, provided as

follows: "It is hereby agreed between the said workman and the said employers that the said weekly compensation of 15*s.* 8*d.* shall be reduced to one-half the amount of the difference between 1*l.* 11*s.* 4*d.* per week and the average earnings of the workman from such light employment, provided the said difference does not exceed 15*s.* 8*d.* per week. It is also agreed that the employers will pay to the workman compensation after the rate of 15*s.* 8*d.* per week during his incapacity to follow light employment owing to the injury referred to." Gough was thenceforward employed to carry batteries in the mine, and while engaged in that employment the second, and fatal, accident occurred on July 10, 1907.

Upon an application by the widow for compensation, the learned county court judge found that the deceased was not working as a collier; that he was employed to carry batteries, and that that was a grade of work; and he made his award on the basis of the average weekly sum paid as wages for that work.

The applicant appealed. The appeal was heard on November 29, 1907.

S. T. Evans, K.C., and *Meager*, for the applicant. The question is, what were the terms of this collier's employment at the date of his death. The county court judge has held that regard ought not to be had to anything but the light employment, and that compensation cannot be taken into account in computing earnings, and he found as a fact that there was a grade in light employment. That is wrong. The judge ought not to have confined himself to the period of the light employment, but ought to have based his award upon a computation of the whole three years. The terms of this employment are such that it is not practicable to take the actual sum which was paid, and therefore you must take the grade of a collier. In any case, having regard to the terms of the agreement, compensation must be taken into account as part of the earnings of the deceased. Where light work is found for ailing men there can be no question of grade. There is no stipulation in the agreement as to the quantum of wages or as to the work to be done. When the facts are ascertained, the question what is a grade is a question

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of law, not a question of fact. The only fact before the judge was that the deceased was employed to carry batteries.

C. A. Russell, K.C., and *A. Parsons*, for the respondents.

[COZENS-HARDY M.R. We think that it is a question of fact what is a grade, and the county court judge has found as a fact that there was a grade. Therefore we do not want to hear you, but we will postpone our judgment, and will deal with all the cases under this Act together.]

Dec. 13. COZENS-HARDY M.R. In each of these appeals a question is raised as to the principle upon which the amount of compensation payable under the Act of 1906 ought to be ascertained. Each involves the consideration of two very difficult and obscure sections, namely, ss. 1 and 2 of the First Schedule to the Act; and I think it desirable in the first instance to discuss the general scheme of this part of the Act and the meaning of those sections apart from the circumstances of any particular case.

Under the Act of 1897, Sched. I., s. 1, the amount of compensation was prescribed in language the effect of which was, in many cases, to make the workman's compensation almost illusory. The Legislature obviously intended to correct hardships of this nature, though the manner in which the result has been secured is somewhat strange. Sect. 1 (*a*) and (*b*) of the schedule to the Act of 1906 is an exact repetition of s. 1 of the First Schedule to the earlier Act; but s. 2 is a new section, which purports to lay down certain rules for the interpretation of s. 1, and for the guidance of those whose duty it is to assess compensation.

Now it is obvious that s. 1, construed by itself, deals with the ordinary case of a workman employed by only one employer, and for a sufficient period to enable his "earnings," or his "average earnings," to be computed with mathematical accuracy. It does not contemplate concurrent contracts of service, or employment which in its nature is casual. For some reason, which is not obvious, three years is the standard period in case of death, whereas twelve months is the standard period in case of partial incapacity, but in either case provision is made for taking an average for any less period. The actual history of the workman furnishes adequate material in ordinary circumstances. Sect. 2

contemplates circumstances which, though not uncommon, may be deemed out of the ordinary course. It lays down certain rules which must be observed wherever "earnings" or "average weekly earnings" occur in the schedule. The dominant principle is to be found in the first sentence of clause (*a*). "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." This can scarcely be confined to one date, namely, the date of the accident; for, under s. 1 (*a*) and (*b*), it is clear that other dates cannot be disregarded. Then follows a proviso which contemplates that there may be cases in which computation is impracticable. No mandatory words are there used; the phrase is simply "regard may be had." The sentence is not grammatical, but I think the meaning is this: Where you cannot compute you must estimate, as best as you can, the rate per week at which the workman was being remunerated, and to assist you in making an estimate you may have regard to analogous cases. Whether the task is "impracticable" must be decided as at the date of the accident. This may be due to deaths, loss of books, or other circumstances. The rate of remuneration may have to be ascertained or estimated, not merely at the date of the accident, but during some earlier period. For example, a collier who has been for twelve months employed in a colliery whose books have been all burnt is entitled under s. 1 (*b*) to compensation based upon his average weekly earnings during that period. It cannot be that the proviso has no operation in such a case. The analogous cases referred to in the proviso by way of guides are the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

This language is borrowed from s. 3 of the Employers' Liability Act, 1880. I am not aware that the word "grade" in this connection has ever been interpreted. I think it refers to the particular rank in the industrial hierarchy occupied by the workman, such as shepherd, carter, or common labourer on a

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farm, or mason or bricklayer or bricklayer's labourer in the building trade, and not to his greater or less excellence in that rank. It is a question of fact whether there is any "grade" to which the workman belongs, and it is likewise a question of fact what is the average weekly amount earned in any particular grade. If there is no grade, an estimate must nevertheless be made. The section primarily contemplates highly organized industries, but it is impossible to limit the Act to such industries.

Having found that the man has a particular grade, and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man or is above or below an average man. This must be so where men in a particular grade are employed on piece work. You cannot reject evidence of the skill and efficiency of the individual workman. Where payment is at so much per hour for every man in a particular grade, the skill and efficiency of the individual may perhaps be disregarded, though I am not prepared to say that the age and the habits of the individual may not have such an influence upon his chance of employment as to deserve consideration. The wages earned at the date of the accident cannot be the sole test. Such a test would operate most unfairly, sometimes for and sometimes against the workman. There are many employments in which work is more plentiful and wages are higher at some seasons of the year than in other seasons. For example, the wages of agricultural labourers are higher during harvest. In all cases in which accurate mathematical computation is impracticable, the object aimed at should be to estimate what I may call the normal rate of remuneration of the injured man. This is the main overriding idea, and to this idea every doubtful suggestion must yield. Days in which no work is done and no wages are earned must be disregarded, except in the one case provided for in s. 1 (*a*).

Sect. 2 (*b*) deals with the case where a workman works for several employers under concurrent contracts of service, and adds together all his earnings for the purpose of charging the

employer at the time of the accident, who has to pay compensation on that footing.

Sect. 2 (*c*) defines "employment by the same employer." Its language is very obscure, but I understand it to mean this: Any step up or step down from one grade to another is to be regarded as commencing a fresh employment. But in calculating any of the periods mentioned in s. 1 you are to disregard absence due to illness or to causes beyond the control of the workman, and to reckon the employment as continuous notwithstanding any such absence. This will be only a presumption which may be rebutted by evidence that the workman was in fact discharged on the ground of such absence and subsequently re-engaged.

The later sections of Sched. I. will doubtless give occasion to discussion on some future occasion, but, as they have no direct bearing upon any of the present appeals, I think it desirable to say nothing about them.

It remains to deal with the separate appeals.

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[After stating the facts the Master of the Rolls continued as follows:—] It is urged on behalf of the appellant Perry that compensation ought to be awarded on the basis of the standard wages paid to casual dock labourers in the district. For the reasons stated in my preliminary observations, I think the learned county court judge has misdirected himself as to the meaning of the word "grade." That word does not involve or depend upon individual characteristics. Each grade may, and indeed must, have good and bad members. The good and the bad are not two grades. I think the case must go back to the learned county court judge to decide whether casual dock labourers form a distinct grade in the hierarchy of labour, and, if so, what are the average earnings in that grade. He may have regard to these average earnings, but he will not be bound to take those average earnings as the basis of his award. He has seen Perry, and is satisfied that he was not getting, and would not get, the full average. But Perry must not be put into an artificial class of bad workers entitled to only half wages. If, however, the county court judge should decide that casual dock

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labourers do not form a distinct grade, it will then be necessary to estimate the proper compensation as best he can without the aid afforded by the proviso in s. 2 (*a*).

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[The Master of the Rolls stated the facts and the findings of the learned county court judge, and continued:—] Notwithstanding some slight ambiguity in language, I think the learned county court judge did not misdirect himself, and that, his findings of fact not being open to review, his award must stand. As I read his judgment, he has not held himself bound, as matter of law, to adopt the average wages as a basis. But, there being no evidence to shew that Cain was either better or worse than an average man, he has thought fit to adopt that basis. The appeal must be dismissed; and the cross-appeal must also be dismissed.

BAILEY *v.* G. H. KENWORTHY, LIMITED.

[The Master of the Rolls stated the facts, and continued:—] The learned county court judge has divided the 83*l.* 2*s.* 1*d.* by 52, and given 15*s.* 11½*d.* as compensation during incapacity, that being one-half the weekly wage thus ascertained. In my opinion this was wrong. Days during which no work was done ought not to be taken into account in arriving at the average wage. The 83*l.* 2*s.* 1*d.* ought to be divided, not by 52, but by the actual weeks or portions of weeks during which work was done. This is in accord with the general scheme of the Act and with the interpretation placed by me upon s. 2 (*c*). It was not Bailey's fault that the mill was shut down during any of the periods (*a*), (*b*), (*c*), or (*d*). His absence from work was unavoidable so far as he was concerned. The award must be varied by inserting the proper figure on the above basis.

GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LIMITED.

[The Master of the Rolls stated the facts, and continued:—] The learned county court judge has held that the man was not working as a collier, that he was employed to carry the batteries, and that that is a grade of work, and must be treated as such.

I cannot see that the learned judge has misdirected himself, or that we can say, as a matter of law, that there cannot be a grade of battery carriers, and that he must have retained his old grade of a collier. If so, the basis of compensation was properly taken on the footing of his employment in that grade of a battery carrier from December 12 until his death. It was somewhat faintly suggested that the money payable in respect of the first accident ought to be added to his earnings. But compensation money is one thing and earnings are another thing. In my opinion this appeal fails.

FLETCHER MOULTON L.J. The provisions of the Act which have to be construed in the cases before us are comprised in the 1st and 2nd sections of the First Schedule to the Act. The importance of these sections can scarcely be exaggerated, inasmuch as they fix the quantum of the compensation to be awarded. Their structure is such that, in order to arrive at a true interpretation, they must be taken as a whole, and therefore I shall begin by considering their meaning generally before applying them to the special circumstances of the several cases which await our decision.

Excepting in one instance, with which I shall deal later on, the first process in the determination of the compensation to be awarded to an applicant is the ascertainment of what is termed in the Act his "average weekly earnings." Although the provisions of the Act give to this phrase a special meaning dependent on the terms of the Act itself, these provisions do not, in my opinion, displace the natural meaning of the term itself, but only render more definite the mode of arriving at the figure which represents it. It is to be an "average." The object of the schedule is to arrive at a fair estimate of what the workman was earning at the date of the accident. But to regard this as rigidly determined by the rate at which he was earning remuneration at the precise moment of the accident would be to adopt a principle which would often lead to unfair results. The remuneration which the workman was earning at that particular moment might be abnormally exaggerated or diminished by reason of temporary and exceptional causes which would

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make it an inaccurate measure of the workman's normal earnings. The Legislature, therefore, by the use of the word "average" indicates that the rate of remuneration is to be arrived at by taking into consideration the earnings during an adequate length of time previous and up to the time of the accident for the purpose of obtaining the average remuneration during that period, rightly deeming that this will more fairly represent the rate of remuneration which the workman was then receiving than would any method of estimating the rate of remuneration solely based on the state of circumstances prevailing at the precise moment of the accident. In doing so it is only adopting the same process that any sensible person would adopt in estimating the rate of remuneration of himself or any other person at a particular point of time. The words "weekly earnings," in my opinion, shew that the Legislature intended that the Court should ascertain what, under the circumstances of employment actually prevailing during the period for which the average is taken, would be the remuneration earned by the workman in a normal week. In my opinion, therefore, the term "average weekly earnings" signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident.

That the above is a fair interpretation of the phrase "average weekly earnings" as used in the schedule appears to me to follow from the rule laid down in the first words of s. 2 (*a*), namely, "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." This rule expresses, to my mind, the dominant note of this part of the schedule. It imposes on the Court the duty of ascertaining what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident, and gives it freedom to do so in the manner best calculated to arrive at a fair result. And I cannot find anything in the schedule which modifies this duty or takes away this freedom. It is intended that the "average weekly earnings" should be a real, and not an artificial, estimate of what rate of

remuneration the workman might fairly be held to be enjoying at the date of the accident.

But when we examine the schedule in order to find the context in which the phrase "average weekly earnings" is used in defining or giving a basis for the estimation of the compensation to be paid to the workman (namely, in the latter part of s. 1 (*a*) and s. 1 (*b*)), we find that it is qualified by the limitation "during the period of his employment by the same employer," or equivalent words. To interpret these words we must refer to s. 2 (*c*). It is there provided that "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident." This makes it clear that in taking the average we are restricted to the period during which the workman has been employed in the same grade. If, therefore, he has been promoted by the employer to a higher grade and is in this grade at the time of the accident, his earnings when in the lower grade are not to be taken into consideration in obtaining the average which is to give his "average weekly earnings." I must not be understood as saying that an increase of wages will necessarily have the effect of excluding from the calculation of this average the weeks in which the lower rate of wages has obtained, because a man's wages may rise or fall without any change of grade taking place. But if there has been a change of grade, they must be so excluded. For instance, if an ordinary seaman has been promoted to be an able-bodied seaman, and continues in that grade up to the date of the accident, s. 2 (*c*) excludes from the calculation of his average weekly earnings the period during which he has been an ordinary seaman.

This rule will suffice for the majority of cases. But it may be that the circumstances existing at the date of the accident and during the period immediately before it (defined in the way I have just described) may not furnish adequate material to enable a fair average to be arrived at. The schedule deals with such cases by the provisions to be found in the latter part of s. 2 (*a*). It will be observed that up to this point we have been dealing, as is natural, exclusively with matters personal to the particular workman, and probably without the existence of special provisions

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in that behalf a Court would feel itself confined to such matters in admitting evidence for the purpose of estimating his average weekly earnings. But the provisions of the latter part of s. 2 (*a*) empower the Court, in cases where the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of his employment, or the terms of the employment, render it impracticable to compute the rate of remuneration at the date of the accident, to resort for assistance in estimating that rate to matters relating to workmen of the same grade employed at the same work by the same employer, or even, should this fail, to persons in the same grade employed in the same class of employment in the same district. These provisions do not appear to me to shew any intention on the part of the Legislature to depart from the fundamental principles with which I have dealt. Their object is only to give greater freedom to the Courts in the admission of evidence in cases where the ordinary modes of computing the average weekly earnings fail; and here, again, they seem to permit or prescribe the same process which would be ordinarily followed in practice by sensible men. But this extraneous assistance is to be treated by the Court only as help. "Regard may be had to" it. In other words (to use the phrase employed by Farwell L.J. in the course of the argument of one of the cases before us), the facts which the Courts may thus take cognizance of are to be "a guide, and not a fetter."

One point of great importance in the interpretation of these provisions remains to be decided, namely, whether in an ordinary case the average weekly earnings are to be calculated by dividing the total earnings during the relevant period by the number of weeks in that period or by the number of weeks actually worked within that period. For instance, if the workman has been in the employment of the same employer prior to the accident for fifteen weeks, in which period there have been holidays amounting to one week or to two half-weeks, or in which he has been absent from work for a week, is the totality of his earnings during that period to be divided by 15 or 14?

This question has, I confess, given me great difficulty, and I cannot say that the words of the Act leave it free from doubt.

But, as I have said, the dominant note is, in my opinion, the provision that the "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated," and in this difficulty I ask myself which of the two methods "is best calculated to give the rate per week at which the workman was being remunerated." Now, if a person who is in the receipt of 2*l.* per week chooses not to go to work during a particular week, and therefore does not receive any remuneration for it, it does not alter the fact that the rate at which he was being remunerated was 2*l.* a week. I have therefore come to the conclusion that in the case to which I have referred the divisor is to be the number of weeks worked, namely, 14. But I should arrive at a different conclusion if the limitation to the time worked arose from the nature of the employment itself. Let me take, for example, a person who is employed by one employer only, but is employed by him in a discontinuous manner—say, for example, a man who is employed to assist in working a ferry on market days or when the river is high, an employment which requires him to be ready to work when called upon, but does not employ him for a fixed period per week. If such a man were paid by the day his average weekly earnings would be the totality of his earnings during the relevant period divided by the number of weeks in that period. His normal week would not be a week in which he was employed through the whole of the six days, but would be a week in which he was employed for an average time. And this would be just and equitable, because the fact that the work was discontinuous, and that he was only being paid when he worked, would regulate the rate of wages. His wages during the days in which he was employed must cover and remunerate him for the enforced unemployment of the intervening period. Similarly the average weekly earnings of a charwoman would not be six times her daily charge; because it would be an incident of her employment to be employed only on so many days in the week as she could find jobs, and the effect of this discontinuity would generally be to make her average week include some idle time.

The hesitation which I have felt in coming to the above

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conclusion arises mainly from the consideration of the provisions applicable to the special case to which I have referred in which the compensation is not based on the average weekly earnings. I refer to the case dealt with by the provisions of the earlier part of s. 1 (*a*) (*i.*), namely, where there has been a fatal accident in the case of a workman who has for the three years preceding the accident been in the employment of the same employers. In this case the compensation is based on the total of his earnings during these three years. We have not here to consider a case in which those earnings have been interrupted during the three years by "absence from work due to illness or any inevitable cause," because according to s. 2 (*c*) that would prevent the earlier period counting, and would thus exclude the case from the special provisions in question, but undoubtedly those total earnings might be diminished by voluntary absence from work. The fact that this is so no doubt justifies caution in accepting any interpretation of the other provisions of the schedule which would prevent voluntary absence from work having this effect in other cases. But it must be remembered that in the special case to which I have referred there is no question of average at all, nor is the Court directed or authorized to ascertain the rate per week at which the workman was being remunerated. None of the language which the Court has to interpret with regard to average weekly earnings applies to the case. The Legislature may well have considered that, in a case where there has been three years' uninterrupted employment by the same employer in the same grade of employment, the most satisfactory solution of the difficult question of quantum of compensation would be to take facts as they stand and let the quantum be the reproduction of the actual earnings of that period. That, at all events, is what it has prescribed, and I do not think that we should be justified in allowing the fact that it has chosen this simple and practical solution in a case where no average has to be arrived at to influence us in the interpretation of the language used in the more difficult case where the compensation has to be arrived at by determining through an average the rate of remuneration at the date of the accident.

There is one case of frequent occurrence which affords an example of the application of these principles. In works where a large number of men are employed it is usually the case that there are periods during the year when the works have to be stopped for holidays fixed and recognized by the trade. In such cases it is not optional to the workmen whether they shall work or not. The works are stopped, and perforce they must be idle. An example of this is presented by one of the cases now before us, where the Lancashire Wakes Week occurs during the relevant period.

As I have already said, the fact that a workman does not work during any week, and is therefore not remunerated during that week, does not, in my opinion, affect the rate of his remuneration; but in the cases with which I am now dealing the enforced idleness of these periods is an incident of the employment of such workmen, and the employers are entitled to urge that an allowance should be made in calculating the average weekly earnings in respect of the employment being to this extent discontinuous. A numerical example will serve to make my meaning plain. Let us assume that workmen are paid by time and are in the receipt of 2*l.* a week at a mill which is closed for holidays for two weeks in the year. The wages earned by such workmen in the year are represented by 50 times 2*l.*, and not by 52 times 2*l.*, and the employer has a right to claim that this shall be recognized in calculating the average weekly earnings just as much as any other lack of continuity in employment which is inherent in the employment itself. But what is not, in my opinion, fair or in accordance with the Act is to allow the calculation of the average weekly earnings of the particular workmen to be affected by the question whether or not a larger or smaller amount of these enforced stoppages occurs in the relevant period which furnishes the material for the average. For instance, two workmen in the same employment at the same wages would, in my opinion, be entitled to have their average weekly earnings estimated at the same figure even though the Wakes Week occurred in the period during which the one had been in the master's employment and did not so occur in the case of the other. The master would be entitled to have

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regard taken to the fact that the average weekly earnings in such employ were somewhat less than the 2*l.* by reason of the fact that only fifty weeks were worked out of the fifty-two of which a year consists, but the rate of remuneration so arrived at must be applied equally to the case of each of the two workmen.

Having now dealt generally with the interpretation of the clauses of the schedule which apply to the cases awaiting our judgment, I will deal with these cases in order :—

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This case is one of considerable difficulty. The facts are very simple. The workman was a casual dock labourer, and there is no dispute as to the rate of payment which such workmen obtain during the time that they are employed. But the employment is a casual one. The men go to the stand and are taken on for a job, and when that job is over they are discharged, and remain idle for a time or get engaged by some other employer who wants workmen. It is common ground that the workman in question was not in the habit of working for the respondents any more than for any other firm, but took a job, if he wished one, wherever he could find it.

Under these circumstances I am satisfied that the case comes within the proviso of s. 2 (*a*) by reason of the casual nature of the employment and otherwise. The Court is therefore at liberty to have regard "to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." Now I am satisfied that the Court cannot say that there was any "person in the same grade employed at the same work by the same employer." A stevedore (such as this man was) who is in the regular employment of a firm, so that he receives weekly wages independently of whether a particular job is or is not in progress, is not, in my opinion, a workman of the same grade as a casual dock labourer. We are driven, therefore, to the second category, namely, "a

person in the same grade employed in the same class of employment and in the same district." In other words, the Court may look at what are the average earnings of a casual dock labourer in the same district. It is here that the main question arises. The learned judge of the Court below has at this stage taken into consideration that the particular workman was a man of poor physique and irregular habits. It is unnecessary to say that labourers who do not stick to their work, and are not of high quality as labourers, earn less than the industrious and capable. The learned judge has therefore decided that there are two grades of casual dock labourers, namely, the good and the bad, and he estimates that the good earn on an average 30*s.* a week, and the bad half that amount, and as he holds that the workman in this case belonged to the second category he has fixed his average weekly earnings at 15*s.* per week. In my opinion the learned judge has adopted an erroneous method. In considering the average earnings of a workman of the same grade he was not entitled to consider whether the workman in question was a good or a bad specimen. By the word "grade" the Act refers, in my opinion, to a class of employment, and not to the relative merits or capabilities of the persons in that class, so that it is an error to talk about a class of good workmen and a class of bad workmen as constituting different grades. The relevant grade in this case was that of casual dock labourers as a whole; and the learned judge was entitled to have regard to the average amount earned by such labourers in the district, but was not entitled to separate them into two grades, namely, the good and bad workmen, and consider only the average amount earned by those whom he included in the latter class.

But, although I am of opinion that the method adopted by the learned judge is not in accordance with the provisions of the statute in this respect, I do not mean that he is in his final determination to exclude all considerations of the capacity or steadiness of the individual workman. On the contrary, I think that, after ascertaining what are the average earnings of a casual dock labourer in that district, he is entitled to consider what on that basis is a fair estimate of the average weekly earnings of the

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workman in question—in other words, how nearly his circumstances approach those of the average labourer. My reason for so holding is that the proviso in s. 2 (*a*) uses the words "regard may be had to"—in other words, it states only that it is permissible for the Court to assist itself by reference to the average weekly earnings of a similar workman in the district, but it nowhere indicates that such weekly earnings shall be deemed to be the average weekly earnings of the applicant. On the contrary, the provision, which, in my opinion, is the controlling provision, enacts that "the average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated"; and if there were circumstances which justify the conclusion that the workman's remuneration would be below or above the average of workmen of the same grade in the neighbourhood, the Court is, in my opinion, bound to give effect to such considerations. But this a matter which must be done by the judge and cannot be done by us, and I am therefore of opinion that the case should go back to the Court below to have the amount of compensation correctly determined.

CAIN v. FREDERICK LEYLAND & Co. (1900), LIMITED.

In this case the learned judge has found that the employment of the deceased workman was that of a casual shipwright, and I see no reason to doubt that this finding is correct. It was as such that he was employed by the respondents at the time when the accident occurred, and I am of opinion that the learned judge was justified in finding that "the shortness of time during which the deceased had been in the respondents' employment and the casual nature of the employment rendered it impracticable to compute the rate of remuneration." He was therefore justified, under the proviso to s. 2 (*a*), in having regard to the average weekly earnings of casual shipwrights in the same district, and, for the reasons that I have given in my judgment in the case of *Perry* v. *Wright*, he was not bound or, in my opinion, entitled to take as the average weekly earnings of such workman the fixed wages per week which shipwrights in the permanent employment of one firm were in the habit of earning.

He was thus confronted with the difficulty of estimating the average weekly earnings of casual shipwrights in the district. Now, in my opinion, these earnings are not to be estimated by exceptional cases of either the very good or the very bad specimens of the class, but by the earnings of an average specimen of the class. It is clear from the facts stated in his judgment that the difference between the extremes is very wide, and he accordingly found as a fact that the average weekly amount earned by an average good shipwright casually employed in the same district as the deceased was 30*s*. This is a finding of fact, and I do not think that we ought to consider it to be based on any erroneous interpretation of the provisions of the schedule, although the learned judge uses some language which might be interpreted into a finding that the good and the bad workman constitute different grades—a conclusion which, in my opinion, is not justified or one which would be in accordance with the word "grade" as used in the schedule. But he does not use the term "grade," and, fairly construed, his language does not appear to me to be open to any objection. [The Lord Justice quoted the passage from the award of the learned county court judge relating to this matter, and continued :—]

There is nothing in the above finding to which I can take exception as a matter of law, and I am therefore of opinion that the appeal fails, and that the cross-appeal likewise fails.

BAILEY *v.* G. H. KENWORTHY, LIMITED.

In this case the sole question is as to the quantum of compensation. The accident was not a fatal one, so that we have to ascertain the rate at which the workman was being remunerated at the time of the accident from a consideration of the earnings in the twelve months immediately preceding the accident if he was in the same employment within the meaning of s. 2 (*c*) during the whole of that period. As a matter of fact, he was in the employment of the same employer in the same grade throughout the whole of the preceding twelve months, and such employment was continuous except for the occurrence of certain holidays, such as the Wakes Week, Christmas, Easter, &c., and various

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short stoppages on account of accidents to the machinery and to a canal adjoining the works. In my opinion none of these constitute absence from work from unavoidable causes such as referred to in s. 2 (*c*), inasmuch as they are not ejusdem generis with illness. I am therefore of opinion that we have here the earnings of a complete twelve months which we are entitled and required to use for the purpose of obtaining the average weekly earnings.

I will assume, for the sake of clearness, that the total of the stoppages from recognized holidays amount to two weeks, and that the remainder of the interruptions from accidents and other causes amount to one week. It appears to me that the right method of proceeding is to say that the sum total of the earnings, namely, 83*l.* 2*s.* 1*d.*, was earned by forty-nine weeks' work, and the average per week thus obtained will give the average wages earned in a week of full work. But there are only fifty weeks of full work in the year, and therefore the average earnings in a week would be less than the figure so obtained by one twenty-sixth part, or about 4 per cent. In other words, the earnings in a week of full work are to that extent higher than the average weekly earnings in the employment, because there is incident to it an enforced idleness of two weeks in the year. The week during which the workman was absent from work on account of breakdown in the works stands in a different position. If such interruptions were a normal and recognized incident, I should consider that they might be treated in the same way as the stoppages with which I have just dealt. Otherwise I should consider that accidental interruptions of that kind ought not to be considered as affecting the rate of remuneration which the workman was receiving.

Having thus obtained the average weekly earnings, it is for the judge to award the compensation on the basis of such earnings; but in this case the learned judge appears to me to have followed an erroneous method of ascertaining the average weekly earnings, and the case must therefore go back to him unless the parties agree upon a figure. (1)

(1) The parties, in fact, agreed to substitute the sum of 16*s.* 11½*d.* for 15*s.* 11½*d.* as the basis of calculation.

GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LIMITED.

In this case the parties have agreed to the amount of compensation to be awarded, subject to our decision on two points of law. The workman at the date of the accident by which he was killed was employed, at certain agreed wages, on light work, namely, moving batteries. He had had a previous accident when in the employment of the same employers which had rendered him incapable of pursuing his previous avocation of collier, and during the period when he had been thereby incapacitated for all work he had been in receipt of a weekly payment of 15*s.* 8*d.* per week. This continued up to December, 1906. By that time he had sufficiently recovered from the effects of the accident to be able to do light work, and accordingly his employers found this light work for him at certain wages agreed between them. He was, therefore, no longer entitled to receive compensation in respect of the accident on the basis of total incapacity for work, and accordingly it was agreed that the 15*s.* 8*d.* per week compensation should be reduced each week by half the amount earned by him in that week. Things were in this state when the accident occurred by which he was killed.

The appellant claims that the amount of compensation which the deceased was receiving should be taken into consideration as part of his weekly earnings. I am of opinion that this contention is unsustainable. What the Court has to assess in the present case is compensation based on his "average weekly earnings," and this is no more affected by the fact that he was in receipt of weekly payments by way of compensation for a previous accident than it would be affected by the fact that he was in receipt of weekly payments left to him by a friend in his will. The fact that the former injury occurred when he was in the employment of the same employers must be immaterial to the question of the compensation to be given for the second accident. We may therefore take this case as one of a workman in the receipt of compensation for an injury which has partially incapacitated him who has taken service with a fresh employer at smaller wages and has met with an accident in that employment. It seems

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scarcely arguable that in such a case the compensation payable by the new employers in respect of that accident would depend on anything other than his average weekly earnings in their employ.

The other point arises on what appears to me to be a misconception of the meaning of s. 2 (*c*). It is said that because this workman was employed to do light work we must not look at the actual earnings, because doing light work is not a "grade," and therefore there was no "employment by the same employer" within the meaning of s. 2 (*c*). In my opinion s. 2 (*c*) is intended solely to affect cases where there has been a change in the terms of the employment, and in such cases it limits the relevant period to the time that has elapsed since the last change in those cases in which the change is of a nature to alter the grade of the workman. But where a workman is continuously employed on unchanging terms for a period sufficiently long to furnish adequate material for obtaining an average, the earnings for that period must ex necessitate rei be considered in ascertaining his "average weekly earnings," whatever be the nature of the employment. In this case the deceased had been working for some six months at the same light work and on the same terms, and I see no difficulty whatever in computing the rate per week at which he was being remunerated. The conditions precedent to the right of the Court to refer to the wages of other workmen do not obtain here, and the Court is therefore not driven, and, in my opinion, is not at liberty, to avail itself of the proviso in the latter part of s. 2 (*a*), so that the question of the existence of other workmen of the same grade does not arise.

I am therefore of opinion that the decision of the learned judge was right, and that this appeal must fail.

FARWELL L.J. I have come to the same conclusion in all these cases, and I had prepared a judgment on the general effect of the Act as far as it relates to all of them; but inasmuch as my conclusions are based on somewhat different reasons, which perhaps are not altogether consistent with those given by the Master of the Rolls and Fletcher Moulton L.J., I have thought

it best, in the interests of the public, not to run the risk of delivering it.

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Solicitors in the first appeal: *Lynskey, Liverpool; Weightman, Pedder & Weightman, Liverpool.*

Solicitors in the second appeal: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool; Helder, Roberts & Co., for Behn, Liverpool.*

Solicitors in the third appeal: *Jaques & Co., for Baguley, Ashton-under-Lyne; Bower, Cotton & Bower, for J. B. Pownall, Ashton-under-Lyne.*

Solicitors in the fourth appeal: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Nov.* 28, 29; *Dec.* 13.

CREMINS *v.* GUEST, KEEN & NETTLEFOLDS, LIMITED.

Employer and Workman—Compensation—Course of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A large number of colliers, who resided at D., six miles away from the colliery where they were employed, were conveyed every morning by a train composed of carriages belonging to the employers, but driven by the railway company, to a platform a quarter of a mile away from the colliery. The platform was erected by the employers on land belonging to the railway company for the exclusive use of the colliers, and was under the control of the employers. The colliers walked from the platform along a high road to the colliery. In the evening a similar train conveyed the colliers from the platform to D. The colliers were conveyed free of charge, and it was an implied term of the contract of service that colliers residing at D. should have the right to travel to and fro without charge. One of the colliers was knocked down and killed while waiting on the platform for the return train. Upon an application by the widow for compensation under the Workmen's Compensation Act, 1906:—

Held (affirming the county court judge), that the accident arose in

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the course of the employment, which began when the colliers entered the train in the morning and ceased when they left the train in the evening.

APPEAL from an award of the county court judge of Merthyr Tydvil, sitting as arbitrator under the Workmen's Compensation Act, 1906.

Cremins was a collier in the employment of the appellants. He and many other colliers lived at Dowlais, six miles from the colliery, which was situate at Bedlinog. A train composed of carriages belonging to the appellants, but driven by the Great Western Railway Company's men, daily conveyed Cremins and many other colliers from Dowlais to a platform at Bedlinog erected by the appellants on land belonging to the Great Western Railway Company. The platform was repaired and lighted by the appellants, and was under their control. The colliers were the only persons allowed to use the platform, but there was a station open to the public at a short distance. The colliers walked from the platform by a high road to the colliery, which was about a quarter of a mile from the platform. A similar train conveyed the colliers from the platform to Dowlais. The colliers were conveyed free of charge. Cremins was waiting on the platform to get into the return train, when he was knocked down and was killed by the train. His widow applied for compensation under the Workmen's Compensation Act, 1906.

The county court judge found that it was an implied term of the contract of service that colliers residing at Dowlais should have the right to be carried from Dowlais to the platform at Bedlinog and back free of charge, and he held that the relationship of master and servant existed between the employers and the deceased at the time of the accident, and made an award in favour of the applicant.

The employers appealed.

C. A. Russell, K.C., and *A. Parsons*, for the employers. This accident did not arise out of or in the course of the employment of the deceased. The men were under no obligation to use the train provided by the employers to take them to and from their work, and during the railway journey they were entirely

independent of any control of the employers. In considering the question of employment there is a distinction between using a train which is provided by the employer for the workmen's convenience and using a train which the workmen are obliged to travel by. There is here no evidence of any implied contract that the relation of master and servant should continue to exist until the workmen reached Dowlais after the day's work. The men were not under the orders of the masters between the time when they left after one period of work and commenced another period.

[They cited *Holness* v. *Mackay & Davis* (1); *Davies* v. *Rhymney Iron Co., Ld.* (2); *Holmes* v. *Great Northern Ry. Co.* (3); *Sharp* v. *Johnson & Co., Ld.* (4); and *Cross, Tetley & Co.* v. *Catterall.* (5)]

[FARWELL L.J. Except in the single case of sub-contracting there is no reference in the Act of 1906 to the employment being in or about the premises. That is strong to shew that the local element has disappeared.]

S. T. Evans, K.C., and *S. Hill Kelly*, for the applicant.

Cur. adv. vult.

Dec. 13. COZENS-HARDY M.R. (after stating the facts). The widow of the deceased collier claims compensation on the ground that the accident arose "out of and in the course of his employment" within the meaning of s. 1 of the Act of 1906. Now, under the old Act, s. 7, there was a further condition, viz., that the accident must occur "on or in or *about*" the mine, the word *about* having the meaning of propinquity to the mine. I assume, without deciding, that under the old Act the widow's claim would have failed. But this *local* condition is no longer in force. Yet it is still as necessary as before to establish that the accident arose not only out of, but "in the course of" the employment. Now the learned county court judge has found that it was an implied term of the contract of service that these trains should be provided by the employers, and that the colliers should have the right, if not the obligation, to travel to and fro

(1) [1899] 2 Q. B. 319.
(2) (1900) 16 Times L. R. 329.
(3) [1900] 2 Q. B. 409.
(4) [1905] 2 K. B. 139.
(5) Unreported. Cited in *Sharp* v. *Johnson & Co., Ld.* at p. 145.

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without charge. This being so, it seems to me clear that the employment began when the colliers entered the train in the morning and ceased when they left the train in the evening, and that the employers are just as liable as they would admittedly have been if the accident had happened at the colliery itself. To avoid misconception, I desire to say that I base my judgment on the implied term of the contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employers' place of business. In my opinion this appeal fails.

FLETCHER MOULTON L.J. In this case the only question for our decision is whether the accident to the workman was an accident arising out of and in the course of his employment. The facts of the case have been fully stated by the Master of the Rolls in his judgment, and I need not recapitulate them. I see no reason to differ from the conclusions arrived at by the judge of the Court below. It appears to me that the workmen were expected to travel to and from the colliery by the trains and in the carriages provided for them by the employers, and that it was intended by both parties that this should be part of the contract of employment. The learned judge finds that the platform on which the workman was at the time of the accident was made, repaired, and lighted by the present appellants and was under their control. The accident occurred to the workman while using this platform in the course of his employment for the purpose for which it was provided by his employers in accordance with the contract of employment. For these reasons I think that the decision of the learned judge is correct and that the appeal fails.

FARWELL L.J. agreed.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Ullithorne, Currey & Co., for D. W. Jones & Co., Merthyr Tydvil.*

H. B. H.

[IN THE COURT OF APPEAL.]

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Oct. 30, 31; *Nov.* 19.

In re JOHN MORRIS AND OTHERS, SOLICITORS, &c.

Solicitor—Lien on Client's Papers for Costs—Acceptance of Securities—Duty of Solicitor to inform Client of Intention to retain Lien.

Where securities are given by a client to a solicitor to secure the payment of particular costs, the solicitor's general lien is unaffected.

Where a solicitor takes any security for his general costs which is inconsistent with the retention of his general lien, since it gives him some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give, that lien is gone unless he gives the client express notice of his intention to retain the lien.

Per Kennedy L.J.: *Semble*, if a solicitor when taking from his client any security for general costs intends to retain his lien, he ought, either by express words or by necessary implication, to make that intention known to his client.

APPEAL from the decision of Bucknill J.

In October, 1900, Messrs. Ashurst, Morris, Crisp & Co. had been acting as solicitors for a Mr. Wyler for about two years in a number of actions and other matters, some of which were still pending and some of which had been completed. On November 9, 1900, and on May 28 and June 19, 1902, Mr. Wyler deposited with Messrs. Ashurst, Morris, Crisp & Co. certain securities consisting of share certificates in various companies. The letters accompanying the securities stated respectively that they were "as security for my account with you," "as security for costs in re House of Lords appeal," and "as security for my account and for the costs in my libel action."

It was contended by the firm as being the proper inference to be drawn, both from the whole correspondence between Mr. Wyler and themselves and from their oral interviews as deposed to on affidavit, that the securities so deposited were not handed to the firm in respect of their general costs, but in respect of counsel's fees and out of pocket expenses of certain particular matters. It was contended for Mr. Wyler that the securities were deposited in respect of general costs, and that the solicitors, in accepting them, had waived their lien on Mr. Wyler's papers and other documents.

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Bucknill J. decided that the securities so given were not given under such circumstances as to destroy the solicitor's general lien, and Mr. Wyler appealed.

Rufus Isaacs, K.C. (*William Wills* with him), for the appellant. (1) Generally speaking, no doubt a solicitor has a lien on all his client's papers in respect of his unpaid costs, but if the solicitor takes any security from the client he loses his lien by so doing, unless he can shew some special agreement between himself and his client that the giving and receiving of the security was not intended to affect his lien. The onus of establishing such an agreement is on the solicitor: *In re Taylor, Stileman & Underwood* (2); *Cowell* v. *Simpson* (3); *Balch* v. *Symes* (4); *Bissill* v. *Bradford Tramways Co.* (5)

J. E. Bankes, K.C. (*A. M. Bremner* with him), for the respondents. A right of lien is discharged by any new arrangement between the parties the terms of which are incompatible with the retention of the lien, and the onus is on the client to establish the existence of an arrangement which is so inconsistent with the lien that it sufficiently indicates the intention of the parties that the lien should not be enforced: *Bank of Africa* v. *Salisbury Gold Mining Co.* (6) There is a material distinction between the cases where security is given by the client and received by the solicitor for general costs and where the security is given and received in respect of disbursements: *Hewison* v. *Guthrie* (7); *Cowell* v. *Simpson* (3); *Angus* v. *McLachlan.* (8) In the latter case the solicitor's lien was treated as being in every way similar to innkeeper's or banker's lien. The cases of *In re Taylor, Stileman & Underwood* (2) and *In re Douglas Norman & Co.* (9) did not lay down any general principle, but turned on the particular form and circumstances of the security given by the client to the solicitor. It is for the appellant to establish a contract between

(1) It is not thought necessary to set out so much of the arguments and judgment as related to the correspondence and interviews between the parties, and to the inferences of fact to be drawn from them.

(2) [1891] 1 Ch. 590.

(3) (1809) 16 Ves. 275.

(4) (1823) T. & R. 87.

(5) (1893) 9 Times L. R. 337.

(6) [1892] A. C. 281.

(7) (1836) 2 Bing. N. C. 755.

(8) (1883) 23 Ch. D. 330.

(9) [1898] 1 Ch. 199.

himself and the respondents which, from its nature, would compel the Court to say that it involved the waiver of their lien by the respondents.

Rufus Isaacs, K.C., in reply. The appellants' proposition as to the law only regards solicitor's lien, and does not apply to either innkeeper's or banker's lien. The relation of a solicitor to his client is entirely different to that of a banker and customer or innkeeper and guest.

Cur. adv. vult.

1907. Nov. 19. LORD ALVERSTONE C.J. read the following judgment:—I have had the opportunity of reading the judgment prepared in this case by Buckley L.J., in which I entirely concur, and I do not, therefore, propose to deal in detail with the authorities which he has examined. I will only say that in my opinion the result of those authorities may be stated as follows.

Prima facie a solicitor has a lien for his charges upon the papers of his client. This lien may be lost, released, or waived in the same way as the liens which other persons possess. The main difference between the case of a solicitor's lien and those other liens is that, where a solicitor takes any security which is in any degree inconsistent with the retention of a lien, it is his duty to give express notice to the client if he intends to retain the lien, and that, should he not do so, his lien will be taken to be abandoned.

Applying now these principles to this case, Bucknill J. has decided that the security given in the months of November, 1900, and May, 1902, was not given under such circumstances as to destroy the plaintiff's lien. It is against this order that Mr. Wyler appeals, and he further contends that the security given in June, 1902, was also given under such circumstances as to discharge the lien. In the month of October, 1900, Messrs. Ashurst, Morris, Crisp & Co. had been acting as Mr. Wyler's solicitors for about two years; they had so acted in a number of matters, some of which were still pending in the year 1900, some of which had been completed. Mr. Wyler states in his affidavit that in the month of October, 1900, Mr. Stevenson, a member of the firm of Ashurst, Morris, Crisp & Co., agreed that he (Wyler)

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should deposit securities with the said firm for the purpose of securing all sums which then were or should thereafter become due from him to them in respect of their fees, charges and disbursements; that, in pursuance of this agreement, he forthwith deposited certain securities, and that on several occasions he made further deposit of securities in accordance with the said agreement. Mr. Stevenson states that the securities received by his firm on November 9, 1900, May 28 and June 19, 1902, were handed to his firm simply as security for counsel's fees and for out of pocket disbursements, and that he never asked Wyler, nor did Wyler agree, to give his firm security for any other purpose, or for his general indebtedness present or future.

In this direct controversy between the persons who were parties to the arrangement it would have been much more satisfactory to me if they had been cross-examined, and if there had been discovery of documents. No application was made for this purpose by either side, and the case was conducted before Bucknill J. and ourselves upon the affidavits only. As regards the deposit of the securities on November 9, 1900, Bucknill J. found in favour of the contention of Mr. Stevenson, and in that finding I concur. [His Lordship then discussed the correspondence, and continued :—]

No further arrangement is suggested until that which occurred in the year 1902. The debentures deposited in May, 1902, were, in my opinion, deposited as security for the costs of the House of Lords appeal, not disbursements only, but costs. This I gather to be the view of Bucknill J., in which I concur, but if necessary the order should make this clear.

It remains only to consider one further point raised on behalf of Mr. Wyler, namely, that in sending the security on June 19, 1902, in a letter which contained the words "as security for my account and for costs in my libel action." Bucknill J. ought to have decided that the security was given and received on account of the general costs, and that therefore the lien was altogether discharged. In my opinion it would not be right, taking the view I do of the other transactions, to come to the conclusion that the use of the words "my account" in this letter are sufficient to shew that the security was being

held generally on account of all costs and charges due to Messrs. Ashurst, Morris, Crisp & Co. upon the understanding that their lien was released and discharged.

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For the above reasons I am of opinion that the decision of Bucknill J. declining to order Messrs. Ashurst, Morris, Crisp & Co. to hand over all papers to Mr. Wyler was right, and that this appeal should be dismissed with costs.

Lord Alverstone C.J.

BUCKLEY L.J. read the following judgment:—Where a solicitor entitled to a lien takes from his client security upon property already included in the lien, or where such an one takes a security which gives time (say for a period of three years), or which gives a right to interest which would not otherwise be payable, it may well be that the lien is gone. In such case there is a new arrangement between creditor and debtor which, within Lord Watson's words in *Bank of Africa* v. *Salisbury Gold Mining Co.* (1), is incompatible with the retention of the lien. The existence of the security is inconsistent with the continued existence of the lien. I point out at the outset that the security in this case has not those characteristics or any of them.

The question which arises in the present case is this general question: Is the solicitor's lien gone (in other words, has the solicitor waived or released his lien) if he takes security for his costs, or for part of them, without communication made to his client by which he expressly or, having regard to all the facts, impliedly reserves his lien; or, at any rate, is the lien under those circumstances prima facie gone, and is the onus on the solicitor to shew that it is not gone, and that he has expressly or impliedly reserved his lien?

No doubt the case of a solicitor differs from that of other persons (say an innkeeper) in respect of his right of lien—a difference which arises from the fact that it is the duty of the solicitor to explain to his client the effect of that which the client is about to do. But, bearing this in mind, the law, as I understand it from the authorities, does not answer affirmatively the general question which I have put. In *Cowell* v. *Simpson* (2), the leading case upon this matter, the question was not simply

(1) [1892] A. C. 281, at p. 284. (2) 16 Ves. 275.

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whether a solicitor who takes a security abandons his lien, but whether a solicitor who takes a particular form of security abandons his lien. I say so, notwithstanding the fact that in *Balch* v. *Symes* (1) Lord Eldon uses the former words. I think he meant no more than to say that he retained the opinion which he had expressed in *Cowell* v. *Simpson*. (2) That opinion, in my judgment, was that, where the solicitor takes such a security as a note payable with interest three years after date, the security taken is such that the lien is gone. Lord Eldon says (3): "It has been put upon a rule of law, that the special contract" (meaning, having regard to the context, any special contract of security) "removes the implied one: but, if that is the ground, this case would deserve much consideration." He ultimately did not rest his judgment on the ground that the special contract removes the implied one, but upon the ground that (4) "where these special agreements are taken," (meaning, I think, such a special agreement as he had been giving by way of instance, and as there was in that case) "the lien does not remain." Tindal C.J. in *Hewison* v. *Guthrie* (5) so lays down the proposition, referring to *Cowell* v. *Simpson* (2) as the authority upon the point. In *Angus* v. *McLachlan* (6), which no doubt was an innkeeper's case, Kay J. says (7): "As I understand the law it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it." Mr. Isaacs has relied strongly upon *In re Taylor, Stileman & Underwood.* (8) The head-note in that case is, I think, too large. It will be found that each of the Lords Justices relies, not upon the fact that the solicitor had taken security from his client without explaining that he reserved his lien, but that he had taken such a security as the solicitor there took. It was a promissory note payable on demand with interest at 5 per cent., and a charge upon a policy to

(1) T. & R. 87, 92.
(2) 16 Ves. 275.
(3) Ibid. at p. 279.
(4) Ibid. at p. 282.
(5) 2 Bing. N. C. 755, 759.
(6) 23 Ch. D. 330.
(7) Ibid. at p. 335.
(8) [1891] 1 Ch. 590.

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secure that sum and interest. It is true that in that case payment was not postponed for a period of time, but there was created a right to interest which otherwise would not have been payable. I cannot find it laid down anywhere in the judgments that the mere fact that the lien was not expressly reserved concludes the matter. That point is not even referred to by either Lindley L.J. or Lopes L.J., and is not made the ground of decision by Kay L.J. The ground of decision is found in the words of Lindley L.J., which Kay L.J. adopts, that (1)—"Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case." I do not find that North J.'s decision in *In re Douglas Norman & Co.* (2) carries the matter further. He was but applying that which had been decided in *In re Taylor, Stileman & Underwood.* (3) I have scanned anxiously the language of Lord Esher in *Bissill* v. *Bradford Tramways Co.* (4) to see whether that case, which is of course binding upon us, laid down the larger proposition. There is some ground in the ultimate sentences of the judgment for saying that it did; but, reading it carefully, I do not think that the Court meant to lay down any more than had been laid down in *In re Taylor, Stileman & Underwood.* (3) After citing passages from that case, in which both Lindley L.J. and Kay L.J. had spoken of the solicitor taking "such a security," as in that case, Lord Esher is reported as going on to say that, "The rule in respect of matters of this kind was there laid down, and the Court had to apply that rule in the present case." I do not think the Court meant to lay down a new or extended rule. In my judgment the facts of this case have to be looked at to see whether the solicitor has taken a security incompatible with the retention of his lien, or has made with his client an arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. These are Lord Watson's words in *Bank of Africa* v. *Salisbury Gold Mining Co.* (5) The Lord Chief Justice has already dealt

(1) [1891] 1 Ch. at p. 597.
(2) [1898] 1 Ch. 199.
(3) [1891] 1 Ch. 590.
(4) 9 Times L. R. 337.
(5) [1892] A. C. 281, at p. 284.

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with the facts of the case. I need not travel through them again. The solicitor's lien is a right of property. It remains in him unless he has expressly or by implication released or abandoned it. The conclusion at which I arrive upon the evidence is that he neither released it nor made any such arrangement as indicates the intention that the right should no longer be enforced. [The Lord Justice then discussed the facts which led him to this conclusion, and continued:—] It remains that for some costs the solicitors are entitled to a lien upon all the papers of the client in their possession. I think the appeal should be dismissed.

KENNEDY L.J. read the following judgment:—In this case I also have come to the conclusion that the appeal should be dismissed.

I should have felt some difficulty in reaching this conclusion if it had been necessary (as, in my opinion, it is not) to concur in the view that it is only in the case of his taking from the client a security for his general costs inconsistent or incompatible with the retention of his lien (inasmuch as it confers a right to interest which would not otherwise be payable, or gives time for payment, or some other special advantage to him, which the enforcement of the payment of his costs through the exercise of his right of lien would not give) that a solicitor has a duty to give notice to his client of his reservation of his right of lien, and that in such a case only ought he to be presumed to have waived or abandoned that right and to bear the burden of proving affirmatively that it has been reserved either expressly or by necessary implication.

My present inclination—for, as I have said, it is not necessary for the decision of the case before us to pronounce a final judgment upon the point, is to hold that the fiduciary relation of the solicitor towards his client, which our law so scrupulously maintains, involves a stricter adherence to the duty of disclosure whenever a solicitor in his dealings with a client procures any advantage for himself. Whatever be the nature of the security, its acquisition in addition to the retention of his right of lien must be an advantage to the solicitor and the taking of

something of value from the client. Of course, if the added security is that which the Lord Chief Justice and Buckley L.J. intend by the epithet "inconsistent"—that is to say, if it gives the solicitor something beyond that which he could get by the exercise of his right of lien—the advantage resulting to the solicitor from such a security is so much the greater; but, be the nature of the security what it may, it confers upon the solicitor some advantage, or he would not take it from his client, and the difference of advantage between one security and another is, it seems to me, a difference of degree and not of essence. In view of the peculiar position which a solicitor occupies in relation to his client, and of the public importance, which the law recognizes, of maintaining the obligations of that relation in their integrity, I should be inclined to hold that, if, when taking from his client any security for costs generally, a solicitor intends to retain the security of his lien, he ought not to be silent, but either by express words or by necessary implication to make that intention known to his client; and that if he fails to prove such a reservation he ought, whatever be the nature of the security he takes, to be treated as having waived or abandoned his right of lien.

In regard to the authorities, I will content myself with saying little more than that any examination of them leads me to think that they would not be found to conflict with the view which appears to me, as at present advised, right in point of principle. *Hewison* v. *Guthrie* (1) and *Angus* v. *McLachlan* (2) do not seem to me to help us, and they are cases in which the judgments are directed to the solution of questions relating to the lien of persons who are not solicitors. Obviously very different considerations arise from the very different position which a solicitor occupies in relation to his client as compared with that of an innkeeper towards his guest or an insurance broker towards the merchant who employs him. When we come to the cases in point, in which the effect of taking a security for costs upon the retention of the solicitor's lien has been considered, the result to my mind, as to judicial opinion, stands thus: It is clear that the acceptance of a security for costs generally without an

(1) 2 Bing. N. C. 755. (2) 23 Ch. D. 330.

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accompanying reservation of the right of lien may operate as a waiver of the lien. In the judgments of Lord Eldon in *Balch* v. *Symes* (1) and of Lord Esher M.R. in *Bissill* v. *Bradford Tramways Co.* (2) is to be found language which appears to me, if read by itself, to justify the view that the solicitor who takes a security for his costs thereby and ipso facto abandons his lien; but I quite agree that in appraising the effect of the language it would not be right to exclude from consideration, in Lord Eldon's case, his earlier judgment in *Cowell* v. *Simpson* (3), and in Lord Esher's case the judgment of the Court of Appeal (Lindley, Lopes and Kay L.JJ.) in *In re Taylor, Stileman & Underwood* (4), from which Lord Esher himself quotes with entire approval in his judgment in *Bissill* v. *Bradford Tramways Co.* (2) In *Cowell* v. *Simpson* (3) and in *In re Taylor, Stileman & Underwood* (4), as also in a case which was not, I think, referred to in the argument before us—*Brownlow* v. *Keatinge* (5), before the Master of the Rolls in Ireland—the judgments do expressly refer to the fact that the security was of a nature "inconsistent" or "incompatible" with the retention of the solicitor's lien. Obviously the character of such a security makes the case for holding it to constitute a waiver of the lien all the stronger, and would therefore be rightly and naturally insisted upon in the judgments, if on that ground alone.

But to take, for the sake of brevity, only the latest case of *In re Taylor, Stileman & Underwood* (4), I do not find in the judgments any express or necessarily implied limitation of the inference of waiver to the taking of a particular kind of security. Nor, evidently, did the learned reporter so understand the judgment; I read in the head-note that "prima facie, where a solicitor, whose duty it is to advise his client as to the rights and liabilities, takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned." And in the later case of *In re Douglas Norman & Co.* (6), when deciding expressly on the authority of *In re Taylor, Stileman & Underwood* (4) that waiver of the solicitor's lien had

(1) T. & R. 87, at p. 92.
(2) 9 Times L. R. 337
(3) 16 Ves. 275.
(4) [1891] 1 Ch. 590.
(5) (1840) 2 Ir. Eq. R. 243.
(6) [1898] 1 Ch. 199.

taken place, where a solicitor had taken from his client the security of a charge upon a reversionary interest upon which he had been retained to negotiate a loan, North J. stated that no distinction, such as had been suggested by the solicitor's counsel, could properly be based upon the fact of the particular security in the case before the Court of Appeal in *In re Taylor, Stileman & Underwood* (1) being a negotiable instrument, whereas in the case before him it was a charge upon a reversionary interest. The gist of his judgment is expressed in one sentence (2): "The bargain was made at a time and under circumstances which made it the duty of the solicitor to inform this young lady, who was his client, fully of her position—to tell her that he was entitled as a solicitor to a lien for his costs upon her documents which were in his possession, and that he intended to assert this lien notwithstanding the security which she was giving him for his costs." It is only as a further, and not as the substantive, reason for his conclusion that the learned judge proceeds to refer to the fact that it might be a long time before the amount of the charge could be realized.

I will only add, in regard to this question, that the authors of text-books of reputation seem to take the view which, as I have said, I should, as at present advised, be inclined to prefer. Leake on Contracts, 5th ed. p. 59, after stating the extent of a solicitor's lien, proceeds, "and by taking a security for his costs and charges, he presumptively abandons his lien." So also Cordery, Law of Solicitors, 3rd ed. p. 372: "According to the general law, a lien is discharged by taking a security inconsistent with the lien, but not if the lien and security are consistent with one another, but as between solicitor and client, prima facie, the lien of a solicitor, whose duty it is to advise his client, is abandoned by taking a security without explaining that he intends to reserve the lien. The case of a banker or innkeeper is different." I have felt it to be my duty to say what I have said upon this question of law, because it appears to me to be not unimportant in itself, and, having had an opportunity of reading the judgments delivered by the Lord Chief Justice and Buckley L.J., I felt that

(1) [1891] 1 Ch. 590. (2) [1898] 1 Ch. 199, at p. 202.

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it was incumbent upon me not to appear by silence to acquiesce entirely and unreservedly in a statement of the general law as to which I am inclined, as I have said, to take a somewhat different view, although, of course, the fact of their opinion makes me doubt the correctness of my own. But, as I said at the outset of this judgment, I do not think that the event of this appeal depends upon the determination of this point of law. What I have said as to the effect, in regard to the retention of his lien, of a solicitor taking a security from his client can apply only to a case in which it is clear upon the facts that the security is given by the client and taken by the solicitor as a security for his costs generally. Upon the facts of the present case, I feel bound to hold as an inference of fact that the securities on each of the three occasions in question—November 9, 1900, May 28, 1902, and June 19, 1902—came into the hands of the respondents as securities, not for costs generally, but for costs in separate and particular matters. The evidence has been so fully dealt with in the judgments which have been already delivered in this Court that it would serve no useful purpose if I referred to them at length. The materials before my brother Bucknill and before this Court are not less unsatisfactory than those which affidavit evidence on disputed questions of fact generally affords, when not sifted by cross-examination of the deponents, and accompanied by a full discovery of material documents. But we have to deal with the case upon the evidence as it is; and I concur generally in the treatment which that evidence has received in the judgments which have been pronounced. It appears to me, upon the whole, that these securities ought to be regarded as securities, not for costs generally, but for particular matters, and that my brother Bucknill's order is substantially right and ought to stand, with the amendment in favour of the appellant in regard to the transactions of May 28, 1902, which the Lord Chief Justice has already mentioned. The order of Bucknill J., indeed, appears to me to be, in regard to the transaction of June 19, 1902, framed even too favourably to the appellant, but there is no cross-appeal on the part of the respondents; and I agree that, subject to the variation I have just referred to, which will only affect the pecuniary amount for which the respondents are

entitled to exercise their right of general lien, this appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Guscotte, Wadham & Co.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

A. P. P. K.

FINCH, APPELLANT *v.* BANNISTER, RESPONDENT.

1907 *Dec.* 9, 10.

Land Drainage—Neglect to clean and scour Channel—Injury to other land—Water Mill—Land Drainage Act, 1847 (10 & 11 *Vict. c.* 38), *ss.* 14, 15.

By the Land Drainage Act, 1847, where by reason of the neglect of an occupier of land to cleanse and scour the channel of a stream lying in or bounding his land injury is caused to any other land, the occupier of that land after due notice, may take steps to cleanse and scour the channel, and recover the expense from the occupier whose neglect has caused the injury.

The respondent was the owner of a water mill, and in consequence of the neglect of the appellant, who was the occupier of the adjacent land, through which the water passed after it had gone over the mill wheel, to cleanse and scour the channel of the stream, the water was penned back so as partially to submerge the mill wheel. Proceedings having been taken under the Land Drainage Act, 1847:—

Held, that the provisions of the Act were confined to injury done to agricultural land, and did not apply where the injury complained of was injury to a mill.

CASE stated by justices.

A complaint was preferred by the respondent under the Land Drainage Act, 1847 (1), against the appellant for that he, the

(1) By the Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 14: "And whereas by reason of the neglect of or want of co-operation among the occupiers of lands to maintain the banks and cleanse and scour the channels of existing drains, streams, or watercourses lying in or forming the boundaries of such lands, and being or leading to the outfall from such lands and from other lands, much injury is occasioned and improvement prevented, but sufficient powers do not at present exist to remedy the evil aforesaid; be it therefore enacted, that in all cases where by reason of the neglect of any such occupier to maintain or join in maintaining the banks, or to cleanse and scour or join in cleansing and scouring the channels of existing drains, streams,

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respondent, was the proprietor of certain lands in the county of Sussex, which were bounded by the channel of a certain stream, which stream also formed the boundary of certain lands of the appellant, and that, the appellant having neglected to clean and scour the channel of the stream, injury was caused to the land of the respondent, to wit, the blocking of the water wheel of the mill of the respondent. Notice having been given under s. 15 of the Act, the appellant was summoned to shew cause why the justices should not grant a warrant or authority to the respondent to enter upon the lands of the appellant in execution of the necessary works for cleansing and scouring the channel of the stream.

At the hearing of the complaint the justices found that the respondent was the owner of a mill which was worked by water power derived from a mill pond. The water, on leaving the mill pond and passing over the water wheel, flowed (after passing under a road and a railway) into an open watercourse on the appellant's land which formed the boundary of the appellant's property. A quantity of silt was formed in the stream where it passed the appellant's land, which had the effect of penning back the water to the mill wheel, and submerging the wheel to the height of a foot. The appellant declined to clean and scour the

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or watercourses lying in or bounding the lands of such occupier, injury shall be caused to any other land, it shall be lawful for the proprietor or occupier of any land so injured to require the proprietor or occupier so neglecting as aforesaid, by a notice in writing . . . . effectually to maintain such banks or cleanse or scour such channels . . . . and in case he shall neglect so to do it shall be lawful for the occupier of the land to which such injury shall be caused, ... to execute . . . . all necessary works . . . ."

By s. 15: "Unless such drain, stream, or watercourse as aforesaid shall be a boundary of or immediately adjoining to the land of the occupier whose land shall have been injured by such neglect as aforesaid, it shall not be lawful for the occupier whose land shall have been so injured to enter upon the land of any other person in the execution of the works aforesaid without a warrant or authority in writing so to do from two or more justices, which warrant or authority such justices shall grant upon inquiry had before them, after a summons served upon the occupier of the land so to be entered upon, if it shall appear to such justices that the neglect of the occupier of the land so to be entered upon has occasioned injury to the lands of the occupier applying for such warrant or authority. . . . ."

watercourse, though he was willing to allow the respondent to come on his land to clear out the watercourse at the respondent's own expense.

The justices were of opinion that the Land Drainage Act applied, and held that the respondent was entitled to an order under s. 15 to enter upon the lands of the appellant in execution of the necessary works, but stated this case for the opinion of the Court.

E. E. Humphrys, for the appellant. The justices were wrong. The Land Drainage Act, 1847, was, as is shewn by the preamble, passed for the purpose of facilitating the drainage of agricultural land. It has no application to mill owners.

Hohler, *K.C.* (*Harker* with him), for the respondent. Sect. 14 of the Act applies wherever there has been "injury to land" from a neglect to cleanse and scour the channel of a stream. "Land" is not defined by the Act, but it is a word of large meaning, and includes buildings such as a mill. It was necessary to apply for an order under s. 15, as the lands of the appellant and respondent do not adjoin, but are separated by the road and the railway.

CHANNELL J. This case depends on the construction of a somewhat obscure section of the Land Drainage Act, 1847. From the preamble to the Act it appears that the Act was passed for promoting the drainage of lands in England and Wales, and the section in question begins "and whereas by reason of the neglect of or want of co-operation among the occupiers of lands to maintain the banks and cleanse and scour the channels of existing drains, streams, or watercourses lying in or forming the boundaries of such lands, and being or leading to the outfall from such lands and from other lands, much injury is occasioned and improvement prevented, but sufficient powers do not at present exist to remedy the evil aforesaid."

The first difficulty is to discover whether the section merely intended to give a better remedy in respect of already existing obligations, or whether it was intended to create new obligations in regard to cleansing and scouring drains, streams, or watercourses forming the boundaries of lands.

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Sect. 14 provides that "in all cases where by reason of the neglect of any such occupier to maintain or join in maintaining the banks, or to cleanse and scour or join in cleansing and scouring the channels of existing drains, streams, or watercourses lying in or bounding the lands of such occupier, injury shall be caused to any other land," the person so injured may, after giving notice, do the work himself and recover the expenses, or, by s. 15, obtain a warrant of two justices to enter on the land of the adjacent occupier neglecting to do the work and remedy it himself.

The word "neglect" as used in the beginning of the section, if it is accurately used, would indicate that the section was intended to enforce a previously existing obligation, because it is not correct to describe as neglect the mere not doing of a thing which there is no obligation to do. It is contended that the words "want of co-operation" which follow have rather a contrary meaning, and that there is nothing in them to suggest the existence of an existing obligation. There is a good deal in the section which goes either way, and I confess that I do not feel very clear about it.

Assuming that the section imposes a new liability, it is not necessary to decide now the exact limits of that liability. If the true construction of the section is that it merely gives a remedy for enforcing existing rights, then it is clear that the appellant is entitled to succeed, as no such right as is now claimed was then in existence. But on the whole I incline to the opinion that the section does impose a new obligation as to cleansing and scouring the channels of existing watercourses. There was no such obligation at common law, and before the Act such an obligation could only exist under exceptional circumstances.

But this new obligation is not an obligation to cleanse and scour in all cases, but only where injury is occasioned to other land by the neglect to cleanse and scour. We have therefore to consider what is meant by the expression "injury to any other land." The whole object of the Act is, as I have stated, to deal with the drainage of land generally. This is a case of a water mill. The rights of mill owners depend generally on prescription.

They have frequently been the subject of litigation, and are fairly well ascertained, I think. I recollect cases of the right of a mill owner to go and clear the mill stream below the mill at his own expense, but, so far as I am aware, the statutory right given by this Act has never been asserted by a mill owner. It is difficult to think that the Legislature intended, when they passed this Act, to give to mill owners such an extensive benefit as this would be. I think that, although the word "land" is a word of large signification, we must look at the context and see whether the word is used in the section in its wider or narrower meaning. There is no definition of "land" in the Act.

I have come to the conclusion, though not without some doubt, that the expression "injury to any other land" in s. 14 does not cover the damage to a mill owner which was complained of in the present case. It is not necessary now to define the cases to which the provisions were intended to apply. It is sufficient, I think, to say that, the object of the Act being to facilitate the drainage of land, the injury which is contemplated by the section is the injury to or the interference with the drainage of other land rather than the interference with land which has been covered with buildings such as a mill.

I cannot hold that the damage caused in the present proceedings comes within the words of the section, and on these grounds I think that this appeal must be allowed.

BRAY J. I am of the same opinion. The contention of the respondent involves the imposition of new and onerous obligations on landowners. It would require a very clear and unambiguous indication on the part of the Legislature to induce me to hold that such was the intention of the section, and I can find neither authority nor reason for saying that the word "land" as used in the section was intended to include a mill as in the present case. The case of *Easton* v. *Richmond Highway Board* (1) is an illustration of the principle which I think should be applied to the construction of this statute—viz., that to take away or prejudicially affect the interest of a landowner without compensation

(1) (1871) L. R. 7 Q. B. 69, at p. 76.

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a clear indication of such an intention from the words used is required.

SUTTON J. I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for appellant: *Biggs-Roche, Sawyer & Co., for Buckwell & Co., Brighton.*

Solicitors for respondent: *Mander & Sons, for Hardwick & Blaber, Brighton.*

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BENNETTS & CO. *v.* BROWN.

Dec. 3, 4, 13.

Ship—Charterparty — Demurrage — Weather working Days — Surf Days—Custom of Port—Admissibility of Evidence—Time allowed for discharge of Cargo—Delay caused by Surf.

The expression "weather working day," as used of lay days for loading or discharging a vessel, has a natural and ordinary meaning, namely, a day on which the work of loading or discharging is not prevented by bad weather. Therefore, where by a charterparty the charterers bind themselves to take delivery of the cargo at an average rate per weather working day, evidence of a custom that at the port of discharge the expression bears a different meaning is not admissible.

By a charterparty a vessel was to proceed to one or two safe ports between Valparaiso and Pisagua inclusive, as ordered on arrival at Valparaiso, and there deliver the cargo in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier where she could always safely lie afloat as directed by the consignees.

The exceptions clause included a provision "detention through . . . . delay by . . . . surf . . . . not to count in the time allowed for loading or discharging." The cargo was to be taken delivery of from alongside ship at port of discharge, "at the average rate of not less than 250 tons per weather working day (Sundays and holidays excepted) . . . ."

The vessel was ordered to discharge at Valparaiso:—

Held—(1.) that evidence was not admissible to shew that by the custom of the port of Valparaiso a surf day (i.e., a day on which the surf on the beach is so heavy that lighters cannot land their cargo there without unusual difficulty and delay) does not count as a weather working day, and that surf days were fixed by the decision of the port

captain; (2.) that the exception "detention through . . . . delay by . . . . surf . . . . not to count in the time allowed for . . . . discharging" was not limited to detention through delay caused by surf in the discharge of the cargo from the ship into lighters, but included detention through delay caused by surf in landing the cargo from the lighters on to the beach.

ACTION tried in the Commercial Court before Walton J. without a jury.

The plaintiffs' claim was for 328*l.* 16*s.* demurrage on the plaintiffs' steamship *Candleshoe* due from the defendants under a charterparty dated October 6, 1905, and a bill of lading dated October 31, 1905.

The plaintiffs were the owners and the defendants the charterers of the steamship *Candleshoe*. The charterparty, which was entered into in London, provided that the vessel should "proceed to Newcastle, N.S.W., and there . . . . load . . . . a full and complete cargo of coals . . . . and . . . . shall therewith proceed to one or two good safe ports between Valparaiso and Pisagua inclusive as ordered on arrival at Valparaiso within twenty-four hours, and there . . . . deliver the said full and complete cargo in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier, where she can always safely lie afloat as directed by the consignees. . . . . (The act of God . . . . detention through strike of pitmen, ... delay by railway, ... storms, surf, weather, ... lock-outs, holidays, or cessation or stoppage of work of any persons engaged in the winning, getting, carrying, delivering, or loading of any of the cargo, to be shipped hereunder, or its discharge, receipt, or removal at the port of discharge, or by reason of accidents in the mines . . . . , or any cause beyond the control of charterers not to count in the time allowed for loading or discharging, and all and every other dangers and accidents of the sea, rivers and navigation, of whatever nature and kind soever, always mutually excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or other servants of the shipowner.) . . . . The cargo to be taken delivery of from alongside ship at port of discharge, at the average rate of not less than 250 tons per weather working

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day (Sundays and holidays excepted) with ten days allowed on demurrage at the rate of fourpence per net register ton per day. . . . . The cargo to be brought to and taken from alongside at merchant's risk and expense as customary. . . . ." The vessel loaded at Newcastle, New South Wales, a cargo of coal shipped by the defendants, who became the holders of the bill of lading. The bill of lading incorporated (inter alia) the above provisions of the charterparty as to discharge. The vessel arrived at Valparaiso on December 6, 1905, and was ordered to discharge there. The defendants took delivery of the cargo under the bill of lading, and the discharge commenced on December 9 and was completed on January 10, 1906. The defendants delivered the coal to the Santiago Gas Company and to the Valparaiso Gas Company under contracts of sale. The coal for the former was taken ex-ship by lighters and discharged on to the beach, and part of the coal for the latter company was taken ex-ship by the lighters and put on the beach and part, at a later period, was taken by the lighters and put on another ship.

Evidence was tendered to the effect that by the custom of the port of Valparaiso a surf day (by which is meant a day on which the surf on the beach is so heavy that lighters cannot land their cargo there without unusual difficulty and delay) does not count as a weather working day, and that, by the custom of Valparaiso, the port captain fixes and settles in a binding way what days are to be deemed or not to be deemed surf days.

The surf did not in any way interfere with the operation of bringing lighters alongside the steamer and placing the goods from the steamer into the lighters. The only way in which the surf interfered with the process of discharging was that when the lighters were loaded they had to be discharged somewhere, and it is usual and quite proper at Valparaiso to discharge lighters on to the beach. There was a difficulty in doing that when there was a heavy surf, because the lighters could not discharge easily, and sometimes not at all, on to the beach. The result was that the lighters were detained, and that they were prevented from making as many journeys as they otherwise would from the beach to the steamer and back again. But there was nothing to prevent the actual operation of discharging from the ship, and it

went on on every day (including surf days) except Sundays and holidays.

The port captain had declared certain days between December 9 and January 10 to be surf days. The plaintiffs alleged that, if the discharge had been carried on at the charterparty rate, the discharge of the cargo of 4720 tons would have been completed (excluding Sundays and holidays) on January 2, 1906, viz., in nineteen days, and they therefore claimed eight days' demurrage at 41*l.* 2*s.* per day. The defendants (inter alia) relied on the custom of the port of Valparaiso that surf days (fixed by the captain of the port) were not weather working days, and they denied that they were liable for any demurrage, or for any detention of the vessel.

J. A. Hamilton, K.C., and *A. Adair Roche*, for the plaintiffs. The discharge was not stopped by reason of the surf. If the alleged custom exists it is unreasonable and inconsistent with the terms of the charterparty: *Holman* v. *Peruvian Nitrate Co.* (1)

Scrutton, K.C., and *Leck*, for the defendants. The delay was caused by surf delaying the discharge on to the beach. The lighters loaded from the ship and discharged on to the beach on the surf days, but owing to the surf they could not discharge at the rate they would otherwise have been able to do. The ship had to discharge in the usual and customary manner, which was to discharge on to the beach. The custom at Valparaiso was that a surf day was not a weather working day, and the port captain decided whether a day was to be deemed a surf day. The discharge covers the discharge into the lighters, and the discharge from the lighters on to the beach. The words "receipt and removal" in the charterparty also refer to what may happen after the goods are placed in the lighters. A day during which goods cannot be landed on the beach at Valparaiso in the usual way is within the exceptions contained in the charterparty, and cannot be counted as a lay day. If the meaning of the charterparty is that delay or detention through surf is not to count in calculating the lay days, the provision

(1) (1878) 5 R. 657.

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applies equally to discharge and removal. "Surf" is the breaking of the sea on the beach, and applies to the discharge from lighters. The evidence shews that at Valparaiso there is a custom that surf days are not to be included as weather working days. The expression "weather working days" must therefore be read as subject to that custom. If there is half a surf day there is only half a weather working day, and by the custom the captain of the port decides whether there is a surf day or not.

The use of such expressions as "strike of pitmen" in the exception clause shews that the intention of the charterparty is not to limit the exceptions to work done alongside the vessel itself. The cargo is to be taken "from alongside," but that does not merely mean from the side of the vessel. [*Branckelow SS. Co.* v. *Lamport & Holt* (1) and Carver on Carriage by Sea, 4th ed., s. 196, were also referred to.]

Hamilton, K.C., in reply. The expression "weather working days" is an English term well known to the commercial community. It has a plain meaning, and no evidence of a custom, in order to vary the meaning of the term, is admissible. Further, the custom that the arbitrary opinion of the port captain is to be binding as to what is a surf day, and therefore not a weather working day, is unreasonable. A day might be a weather working day for a large vessel but not for a small one. The expression "weather working day" must mean a weather working day for the particular vessel. The alleged custom is inconsistent with the terms of the charterparty.

The word "discharge" in the exceptions clause is limited to the actual discharge from the vessel into the lighters. It is true that the "discharge" may sometimes cover the landing of the goods. *Smith* v. *Rosario Nitrate Co.* (2), *Hudson* v. *Ede* (3), and *Allerton Sailing Ship Co.* v. *Falk* (4) are illustrations of the process of loading extending inland where there is one cargo coming from one place. The analogy could be applied to the discharge in the present case if there were only one method of discharge under the charterparty. But the consignees have the option of ordering the ship to discharge in many ways (e.g.,

(1) [1897] 1 Q. B. 570.
(2) [1894] 1 Q. B. 174.
(3) (1867) L. R. 2 Q. B. 566.
(4) (1888) 6 Asp. M. C. 287.

alongside another vessel) where surf can have no effect. [*Elswick* v. *Montaldi* (1) was also referred to.]

Cur. adv. vult.

Dec. 13. WALTON J. delivered the following judgment:—This is an action brought by shipowners against charterers for demurrage at Valparaiso, the port of discharge. The charterparty provided that the vessel was to proceed to "one or two good safe ports between Valparaiso and Pisagua inclusive as ordered on arrival at Valparaiso within twenty-four hours." She was ordered to discharge at Valparaiso, so that the voyage was really a voyage to Valparaiso. The charterparty continues—"and there . . . . deliver the said full and complete cargo in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier, where she can always safely lie afloat as directed by the consignees." Then follow certain exceptions. The exception which seems to me to apply in the present case is "detention through . . . . delay by . . . . surf." Other exceptions, which illustrate the scope of the exception clause, are, "cessation or stoppage of work of any persons engaged in the winning, getting, carrying, delivering, or loading of any of the cargo, to be shipped hereunder, or its discharge, receipt, or removal at the port of discharge." Detention from those and other causes is not to count in the time allowed for loading or discharging. So that detention through surf, by the terms of this charterparty, was not to count in the time for loading or discharging.

The time for discharging was fixed, and therefore the obligation to discharge within the time fixed was a strict one. The time was fixed by these words: "The cargo to be taken delivery of from alongside ship at port of discharge, at the average rate of not less than 250 tons per weather working day (Sundays and holidays excepted) with ten days allowed on demurrage at the rate of fourpence per net register ton per day. . . . . The cargo to be brought to and taken from alongside at merchant's risk and expense as customary."

The defence in the present case is that, if there was delay,

(1) [1907] 1 K. B. 626.

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it was caused by surf. There is also a further plea in the points of defence that "by the custom of the port of Valparaiso, surf days are not weather working days and half surf days are half weather working days." It is said, and there was evidence to the effect, that by the custom of the port of Valparaiso a surf day (by which I understand is meant a day on which the surf on the beach is so heavy that lighters cannot land their cargo there without unusual difficulty and delay) does not count as a weather working day, and, although it is not quite so stated in the plea, there was further evidence that, by the custom of Valparaiso, the port captain fixes and settles in a binding way what days are to be deemed or not to be deemed surf days; so that the custom relied upon was a kind of double custom that surf days were not weather working days, and that the number of surf days by custom was to be fixed absolutely by the decision of the port captain.

The first question I have to consider is whether, as between the parties to this charterparty, which was made in London, the charterers can rely upon such a custom. The custom appears to me to give a meaning to the words "weather working days" which is not their plain and natural meaning. I may mention that, as far as I can understand, the discharging did go on every day, including those days which are called surf days.

The conclusion at which I have arrived is that "weather working days" is a well-known phrase. Whether it is perfectly grammatical and perfectly good English is not for me to consider; but it is a phrase, I think, which has grown into common use, and is generally understood and has come to have an ordinary meaning as part of the English language (at any rate, as part of the English language which is used by men of business), and I think it has a natural meaning, viz., a day on which the work of discharge—it might be of loading, but in the present case it is of discharge—is not prevented by bad weather. The phrase might refer to half a day. Half a day might not be weather working and the other half might be weather working, but I think that that is the natural meaning of the words, and I do not think that it is competent to the charterers in a charterparty of this kind, worded as this charterparty is, to put upon that expression a different meaning which, it is said, the

words by custom have obtained at the port of Valparaiso. I am of opinion that the charterers are bound by the words of the contract, and they were to discharge 250 tons per weather working day.

It is also to be remembered that under the charterparty the obligation upon the charterers was to take delivery from alongside the ship. The charterers had the right to order the ship to any wharf, vessel, steamer, floating dock, hulk, launch, or pier. They had that large option given to them, and in this case they elected to have the vessel discharged into lighters, while she was lying at anchor in the bay. That being so, it became the duty of the charterers to take delivery in lighters from alongside the ship so lying at anchor. Strictly speaking, when the shipowner had delivered the cargo into the lighters, he had nothing further to do with it; his responsibility ended—it was for the charterers to take delivery from alongside the ship—and, as far as I can understand, there was never anything in the weather to prevent that being done.

There were a number of days called surf days, but the surf did not in any way, so far as I understand, interfere with the operation of bringing lighters alongside the vessel and discharging the goods from the vessel into the lighters. The only way in which the surf interfered with the process of discharging—if it can be called part of the process of discharging—was this: that, when the lighters were loaded, they of course had to be discharged somewhere, and it is usual and quite proper at Valparaiso to discharge lighters on to the beach. There was a difficulty in doing that when there was a heavy surf, because the lighters could not then discharge easily on to the beach—sometimes not at all. The result of that was to detain the lighters, and to prevent them from making as many journeys as they otherwise would from the beach to the steamer and back again. But there was nothing to prevent the actual operation of discharging from the ship, and it went on on every day except Sundays and holidays. But although that is so, and although I do not think that the charterers can rely upon any custom which would give any meaning different from their natural sense to the words "weather working day"—they certainly cannot rely upon any custom which

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would make the captain of the port a kind of arbitrator who should settle conclusively what was a weather working day and what was not—it is in my opinion open to the charterers to rely upon the exception "Detention through . . . . surf . . . . not to count in the time allowed for . . . . discharging." It has been suggested that, as the surf did not prevent the discharge of the cargo from the ship into the lighters, but only from the lighters on to the beach, those words do not apply, the operation of discharge being completed by placing the goods into the lighters. However, I do not take that view. It is quite competent for the parties to agree that anything which prevents getting the goods away from the ship's side shall not count in the days for discharging; and indeed it is a very natural thing for them to do, because it obviously would be unreasonable and very troublesome and inconvenient to have the lighters lying loaded afloat for a long time during which it would probably be impracticable to fill their places readily and quickly so as to keep up the rate of discharging from the ship as if there was no surf on the beach. I am of opinion that by the terms of this charterparty the parties have agreed that, if surf interferes with the discharge and causes detention, the detention shall not be taken into account in the time for discharging. Now by "surf" they must, I think, have meant surf on the beach, and the detention they must have had in their minds must have been detention, not in discharging the cargo into the lighters, but in landing the cargo from the lighters on to the beach, and I come to the conclusion that that exception does apply.

But as surf days may still be weather working days, and as I am not bound, nor are the plaintiffs by the decision of the captain of the port, it leaves to me the very difficult question of saying precisely how much of the delay was caused by the difficulty created by the surf. There having been delay, it is for the defendants to bring themselves within the exception. In my opinion there was probably a delay of more than three days over the whole period caused by the surf difficulty.

I may say that I do not measure the delay merely by the quantity of cargo that was left from one day to the next in lighters owing to the surf—if that was the only thing to take into account it would be comparatively easy to calculate.

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Although that affords some measure of the delay, I think there was more delay than that which arose merely from the detention of loaded lighters from one day to another, as on some days no doubt it would be very difficult for the lighters to make as many journeys as they would have done if there had been no surf.

On the whole, I think I shall be doing justice if I give judgment for the plaintiffs for two and a half days' demurrage, that is, for 102*l.* 15*s.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitor for defendants: *J. Wicking Neale.*

J. E. A.

[IN THE COURT OF APPEAL.]

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Nov. 5, 7, 21.

LEONIS STEAMSHIP COMPANY, LIMITED *v.* RANK, LIMITED.

Ship—Charterparty—Demurrage—Lay Days—Arrival at Place of Loading.

When the place named in a charterparty as the place of loading is a port or other wide district (as distinguished from the case in which the charterparty either names a definite spot in the port or dock as the place of arrival, or gives the charterer in express terms the right to order a vessel to a definite and precise loading spot), the lay days begin when the ship is ready and at the freighter's disposal within the named place in its commercial sense, though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go.

By a charterparty it was agreed that the plaintiffs' steamship should "proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . viz., (4.) at one or two safe loading ports or places in the river Paranà, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship . . . . time for loading shall commence to count twelve hours after written notice has been given by the master . . . . that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers."

The vessel was ordered to Bahia Blanca. She arrived off the pier at

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Bahia Blanca, and anchored in the river within the port a few ship's lengths off the pier. The master then gave notice that the ship was ready to load. The charterers desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port:—

Held (reversing the judgment of Channell J., [1907] 1 K. B. 344), that the lay days commenced twelve hours after the notice of readiness to load given by the master, and not from the time the vessel obtained the berth alongside the pier.

Nelson v. *Dahl*, (1879) 12 Ch. D. 568, and *Pyman* v. *Dreyfus*, (1889) 24 Q. B. D. 152, explained and followed.

APPEAL from a judgment of Channell J. at the trial of the action in the Commercial Court without a jury (reported [1907] 1 K. B. 344).

The action was brought by the plaintiffs, the Leonis Steamship Company, Limited, against the defendants, Messrs. Joseph Rank, Limited, of Hull, for (inter alia) demurrage.

The plaintiffs were the owners of the steamship *Leonis*, which was of 2660 tons gross register, and the defendants were the receivers of the cargo and the holders of the bills of lading, dated respectively March 31 and April 3 and 5, incorporating a charterparty, dated December 30, 1904, made between the plaintiffs of the one part and Messrs. Brauss, Mahn & Co., of Buenos Ayres and Antwerp, of the other part.

The charterparty (so far as material) was as follows: "Buenos Ayres, ... December 30, 1904. The Uniform River Plate Charterparty, 1904.

"Homewards—Steam.

"It is this day mutually agreed between Thos. L. M. Rose as broker for and on behalf of owners of the good screw steamship called the *Leonis* of the measurement of 2660 tons gross and 1701 tons net register, ... now trading and Messrs. Brauss, Mahn & Co., Buenos Ayres, charterers (3.)—that the said ship being tight, stanch, and strong and in every way fitted for the intended voyage, shall . . . . after arrival at Montevideo . . . . and after discharge of her inward cargo, if any, proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . in bags and (or) bulk, to be loaded as follows—viz., (4.) at one or two safe loading ports or places in the river

Paraná, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, ... (5.) and being so loaded shall with reasonable speed therewith proceed to St. Vincent . . . . or Las Palmas . . . . at master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at a safe port in the United Kingdom, ... or so near thereunto as she can safely get (always afloat) and deliver the cargo, in accordance with the custom of the port for steamers, on being paid freight at and after the following rates—viz. (6.) 18*s.* 3*d.* per ton for cargo loaded in the river Paraná . . . . (9.) Charterers have the option of loading at a third port in the river Paraná within the above limits, in which case the freight to be 6*d.* per ton more on the entire up-river cargo; (10.) Charterers have the option of loading the entire cargo at Bahia Blanca at the rate of 17*s.* 6*d.* per ton. (21.) Orders for the first loading port are to be given by the charterers (or their agents) immediately upon the written application of the master, brokers or agents between 9 A.M. and 6 P.M., ... upon master's report of arrival in ballast . . . . at Montevideo or at an Argentine port as per clause 3, otherwise time used in waiting for orders shall count as lay-days, and the cancelling date shall be correspondingly extended. (22.) Lay days not to commence before February 15, 1905, unless charterers begin shipping sooner, and should steamer not be ready to load by 6 P.M. on March 15, 1905, charterers to have the option of cancelling this charterparty; and for the purpose of this clause the preliminary twelve hours' notice of readiness to load, stipulated for in clause 23, shall not be obligatory. (23.) Cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted, (if the ship be not sooner despatched) and time for loading shall commence to count twelve hours after written notice has been given by the master . . . . on working days between 9 A.M. and 6 P.M. to the charterers or their agents that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers . . . . to the ship, at the rate of 4*d.* sterling per gross register ton per day. . . . .

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(31.) . . . . Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage and all other charges whatsoever. . . . . (39.) If the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores . . . . railway employees or other labour connected with the working, loading or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay days (unless any cargo be actually loaded by the steamer during such time) but lay days to be extended equivalent to the time lost owing to such cause or causes. . . . ."

The *Leonis* proceeded to Montevideo under the charterparty, and upon her arrival there she was ordered by the charterers to proceed to Bahia Blanca.

Bahia Blanca is a port at which cereals (and it was wheat which the charterers were to load) are usually loaded alongside the railway pier or mole jutting out into the river, to which railway trucks come with the cargo. The *Leonis* arrived at Bahia Blanca on February 24, 1905. The river was crowded with shipping waiting to be loaded, and the loading space alongside the pier—the spot where the charterer desired the ship to receive her cargo—then was, and it continued to be occupied by other vessels, and so the *Leonis* on her arrival anchored in the river within the port and only a few ship's length off the pier, and in the usual place where steamers lie whilst waiting for a berth at the pier. Her master on the same day gave notice that the ship was ready to load. The crowded state of the port continued for a long while to prevent her from getting a berth at the pier, and the *Leonis* lay at her anchorage until March 28. On March 29 the *Leonis* was ordered to go alongside another vessel which was berthed alongside the pier, and she did so, and she there received some cargo from a lighter. The next day, March 30, the *Leonis* got a berth alongside the pier, and her loading was completed April 5. The plaintiffs, the owners of the *Leonis*, claimed demurrage upon the basis of the commencement of the lay days from the expiration of their notice of readiness to

load. The defendants resisted this claim, and asserted that her lay days did not commence until the *Leonis* was berthed alongside the pier.

Channell J. gave judgment for the defendants.

The plaintiffs appealed.

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J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs. The question turns on whether Channell J. was right in the view he took of the decision in *Pyman* v. *Dreyfus*. (1) The third proposition laid down in s. 627 of Carver on Carriage by Sea, 4th ed., to the effect that "When the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go," applies to the present case. In *Pyman* v. *Dreyfus* (1) the ship had arrived at a place where she could not load. Channell J. held that *Pyman* v. *Dreyfus* (1) had never been overruled, but that it was there decided that a ship is not an arrived vessel until she gets within the port to a usual place of loading. But *Pyman* v. *Dreyfus* (1) shews that she is an arrived ship when she gets within the ambit of the port which is the place of loading although she is not at the actual spot of loading. In *Davies* v. *McVeagh* (2) Bramwell L.J. distinguished between the place and spot of loading. The decision of Channell J. in the Court below is exactly the opposite of that in *Pyman* v. *Dreyfus*. (1) It is impossible to support the judgment of Channell J. without overruling *Pyman* v. *Dreyfus*. (1) The decision in that case has never been overruled. It followed *Nelson* v. *Dahl* (3), in which an exposition of the law was given by Brett L.J. The decision in *Tharsis Sulphur Co.* v. *Morel* (4) put an end to the dispute which had arisen as to who had to bear the cost where the charterer had the right to order the vessel to a particular berth, and neither Lord Esher M.R. nor Bowen L.J. referred to *Pyman* v. *Dreyfus*. (1) Nor was *Davies* v. *McVeagh* (2) dealt with on any ground which is material to

(1) 24 Q. B. D. 152.
(2) (1879) 4 Ex. D. 265.
(3) 12 Ch. D. 568.
(4) [1891] 2 Q. B. 647.

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the present case, but *The Carisbrook* (1) was overruled. In *The Felix* (2) there was no direct dispute as to lay days. In his judgment Channell J. in effect says that the admission made by counsel in *Sanders* v. *Jenkins* (3) brought that case within the decision in *Tharsis Sulphur Co.* v. *Morel* (4), i.e., made the unloading place a named place in the charterparty, and undoubtedly Collins J. understood in *Sanders* v. *Jenkins* (3) that it was admitted that, under the charterparty, the charterers had an option of designating the particular wharf at which they desired the ship to unload. The attention of the Court does not appear to have been drawn to *Pyman* v. *Dreyfus*. (5) *Pyman* v. *Dreyfus* (5) has never been doubted, and the Court will not overrule a decision which has been acted on for upwards of seventeen years unless it is contrary to some mercantile rule, or would make mercantile practice unsafe if followed in the future. The charterer can always protect himself by inserting an express provision in the charterparty that the lay days are not to commence until the ship arrives at the spot in the port designated by him, and the shipowner can charge an amount of freight proportionate to the probable delay in getting to the designated spot after arrival within the ambit of the port of destination. The charterer has the best means of knowing most about the port of loading, and therefore the best means of judging of the risk of delay in obtaining a berth. It is therefore right that the ship should, in the absence of an express provision to the contrary, be treated as an arrived ship when she is within the ambit of the port. When she arrives in the port she is an arrived ship, just as if she is ordered to a dock she is an arrived ship when she gets into the dock. In *Postlethwaite* v. *Freeland* (6) the ship was chartered to proceed to East London, Cape of Good Hope. She arrived at East London on September 1, 1875. Lord Blackburn, in giving judgment, said: "No question could have been made, if there had been lay days in the present charterparty, that they would have begun to run on the 1st of September."

(1) (1890) 15 P. D. 98.
(2) (1868) L. R. 2 A. & E. 273.
(3) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(4) [1891] 2 Q. B. 647.
(5) 24 Q. B. D. 152.
(6) (1880) 5 App. Cas. 599.

If that is a correct statement, it is conclusive of the present case, and entirely supports Carver on Carriage by Sea, 4th ed. s. 624a, where it is said that "the rule, then, appears to be, that when a fixed period is allowed for loading or discharging, and the place named in the contract for the loading or discharging is of wide extent, and not a definite spot, the lay days begin when the ship is ready and at the charterer's disposal within the named place, although she may not be in the berth or dock where the particular cargo is to be loaded or discharged."

T. E. Scrutton, K.C., and *A. J. Ashton, K.C.*, for the defendants. It is very important that there should be a decision upon the question whether the burden of getting to a usual loading place is upon the shipowner or charterer. The weight of authority is in favour of the view that demurrage does not commence till the vessel has arrived at the usual place of loading nominated by the charterers. The risk of berths being occupied by other ships falls on the vessel, not on the charterers. Clause 23 of the charterparty means that the master is to give notice when the vessel is in her proper berth ready to load: *Sanders* v. *Jenkins*. (1) There has been some conflict of authority upon the question whether the risk of delay in the ship being able to get to the berth ordered by the charterer falls upon the shipowner or the charterer. Until the decision in *Tharsis Sulphur Co.* v. *Morel* (2) the following authorities could have been relied upon in support of the contention that the risk falls upon the charterer: *The Carisbrook* (3); *Dall' Orso* v. *Mason & Co.* (4); *Ashcroft* v. *Crow Orchard Colliery* (5); *Pyman* v. *Dreyfus* (6); *Davies* v. *McVeagh*. (7) In *Murphy* v. *Coffin* (8) the opposite view was taken. That case is an authority for the proposition that the risk is on the shipowner, if the charterer names a place to which it is impossible to get immediately. *The Carisbrook* (3) was overruled by the Court of Appeal in *Tharsis Sulphur Co.* v. *Morel* (2), and it was said that the decision in *Dall' Orso* v. *Mason* (4) was wrong, and that in *Murphy* v.

(1) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(2) [1891] 2 Q. B. 647.
(3) 15 P. D. 98.
(4) (1876) 3 R. 419.
(5) (1874) L. R. 9 Q. B. 540.
(6) 24 Q. B. D. 152.
(7) 4 Ex. D. 265.
(8) (1883) 12 Q. B. D. 87.

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Coffin (1) right. The Court of Appeal in *Tharsis Sulphur Co.* v. *Morel* (2) affirmed the principle that the risk of not being able to get to the berth ordered by the charterer falls upon the shipowner. *Pyman* v. *Dreyfus* (3) must be considered to have been overruled.

In *Tharsis Sulphur Co.* v. *Morel* (2) there was an express clause in the contract giving the charterers the right to order the ship to a berth. In *Sanders* v. *Jenkins* (4) there was no express clause giving the charterers the right to name a place to which the ship was to go. In *The Felix* (5) it had been decided that the charterer had the right to name the place of discharge where the charterparty was similar to that in *Sanders* v. *Jenkins.* (4) It follows that the charterer has the right to choose a usual place of discharge. *The Felix* (5) shews that counsel for the plaintiff in *Sanders* v. *Jenkins* (4) made the admission that the charterers had an option of designating the particular wharf at which they desired the ship to unload, for the reason that if the charterparty provides that the vessel is to proceed to a port and there deliver a cargo the law reads in the words "in the customary manner." The shipowner only fulfils the contract when he goes to the usual place of discharge named by the charterer. Therefore in *Sanders* v. *Jenkins* (4) the point was decided which arises in the present case. *Brereton* v. *Chapman* (6) and *Kell* v. *Anderson* (7) are to the same effect as *Sanders* v. *Jenkins.* (4) In *Monsen* v. *Macfarlane* (8) the decision turned upon the provisions of the colliery guarantee. On principle it seems clear that, as the lay days begin to run when the ship gets to the place she has to get to, the charterers have the right to order her to such a place. Whether the charterparty expressly or impliedly gives the charterer the right to name the particular berth at which the ship shall discharge, the lay days do not begin to run till the ship has got there. That position is limited in Carver on Carriage by Sea, 4th ed.

(1) 12 Q. B. D. 87.
(2) [1891] 2 Q. B. 647.
(3) 24 Q. B. D. 152.
(4) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(5) L. R. 2 A. & E. 273.
(6) (1831) 7 Bing. 559.
(7) (1842) 10 M. & W. 498.
(8) [1895] 2 Q. B. 562.

s. 624b, and proposition (4.) of s. 627 to the case where the charterparty expressly gives the charterer the right, but it is equally true if the right is given by the charterparty impliedly. Propositions (1.) and (2.) laid down in s. 627 of Carver on Carriage by Sea are correct.

Logically the lay days ought not to commence before the vessel gets to the place where the charterer is entitled to order her to discharge. The obligation to load only begins when the vessel is at her loading place. It was settled in *Hulthen* v. *Stewart* (1) that there is a great difference between the case where there are a fixed number of lay days and where the obligation is to load with "usual despatch." The expression "usual despatch" means that the circumstances of the case are to be taken into consideration. If the charterparty provides that the ship is to load at a port, the lay days do not begin to run until the ship has reached a usual loading place selected by the charterers in the port. If under the charterparty the ship has to load at a dock, the obligation to load commences when the ship is inside the dock. In practice it is frequently the dockmaster who chooses the place of loading, and the charterer has no real option. If the ship is to go "to a loading place as ordered," the lay days do not commence till the ship is at the loading place to which she is ordered. The decisions in *Bulman* v. *Fenwick* (2) and *Dobell* v. *Green* (3) shew that the charterer has the right to choose the loading place even though it is crowded. In *The Felix* (4) there were two usual places of discharge, and Sir Robert Phillimore laid it down that the charterer had the right to select the place. That right was recognized in *Parker* v. *Winlo*. (5) In *Tapscott* v. *Balfour* (6) the dockmaster had the right to select a berth in the dock, and the ship had therefore arrived at the dock the charterer had ordered her to. The judges who were parties to that decision had not in their minds the case where there are three or four usual places of discharge. Until *Ashcroft* v. *Crow Orchard Colliery* (7) the decisions had been uniform that the vessel must

(1) [1903] A. C. 389.
(2) [1894] 1 Q. B. 179.
(3) [1900] 1 Q. B. 526.
(4) L. R. 2 A. & E. 273.
(5) (1857) 27 L. J. (Q.B.) 49; 7 E. & B. 942.
(6) (1872) L. R. 8 C. P. 46.
(7) L. R. 9 Q. B. 540.

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get to the usual place of discharge. *Ashcroft* v. *Crow Orchard Colliery* (1) was explained by Lord Blackburn in *Postlethwaite* v. *Freeland* (2), by Brett L.J. in *Nelson* v. *Dahl* (3), by Barnes J. in *Ogmore SS. Co.* v. *Borner* (4), and by Bigham J. in *Harrowing* v. *Dupré*. (5) Where there is no express provision in the charterparty, the charterer has the right to choose a usual place of discharge. The charterer has to make all arrangements as to where the cargo has to be loaded, and it therefore seems to be reasonable that he should have the right to say to which of the usual loading places at the port the ship is to go. There is an obligation on the charterer to load in a given or ascertainable number of days, which does not begin to come into operation until the ship arrives at the loading place. The same proposition is true with regard to the obligation to discharge. In *The Norway* (6) the only question was whether the master had deposited the cargo in the right place under the Merchant Shipping Act Amendment Act, 1862. *Nelson* v. *Dahl* (3) is explained in *Nielsen* v. *Wait*. (7) The true proposition to be deduced from the authorities is that the lay days begin when the vessel has finished her carrying voyage, or her voyage to the loading place; and that when the place named in the charterparty is a dock she is at the end of her carrying voyage when she gets to the dock, and if the place named is a port when she gets to the usual place of discharge in the port. In order to decide in favour of the plaintiffs it will be necessary to overrule *Parker* v. *Winlo*. (8) The decision in *Good* v. *Isaacs* (9) follows that in *Tharsis Sulphur Co.* v. *Morel*. (10) [Carver on Carriage by Sea, 4th ed. s. 460, *Aktieselskabet Inglewood* v. *Millar's Karri and Jarrah Forests* (11), *Brown* v. *Johnson* (12), *Strahan* v. *Gabriel* (13), and *Sailing Ship Milverton Co.* v. *Cape Town Gas Light and Coke Co.* (14) were also referred to.]

(1) L. R. 9 Q. B. 540.
(2) 5 App. Cas. 599.
(3) 12 Ch. D. 568.
(4) (1901) 6 Com. Cas. 104.
(5) (1902) 7 Com. Cas. 157.
(6) (1865) 12 L. T. 57.
(7) (1885) 16 Q. B. D. 67.
(8) 27 L. J. (Q.B.) 49; 7 E. & B. 942.
(9) [1892] 2 Q. B. 555.
(10) [1891] 2 Q. B. 647.
(11) (1903) 8 Com. Cas. 196.
(12) (1842) 10 M. & W. 331.
(13) (1879) cited in 12 Ch. D. 590.
(14) (1897) 2 Com. Cas. 281.

J. A. Hamilton, K.C., in reply. The Court will be slow to overrule the decision in *Pyman* v. *Dreyfus* (1), which is upwards of seventeen years old. It is impossible to support the judgment of Channell J. in the Court below without overruling *Pyman* v. *Dreyfus*. (1) It is not necessary to criticize the decision in *Parker* v. *Winlo*. (2) In that case it was conceded by counsel that the particular charterparty might be dealt with as if the wharf had been named in it. That case only shews that if the charterer names a place that it is impossible to get to he must pay demurrage, although he has the right to name the place. Clauses 22 and 23 of the charterparty in the present case are aptly drawn for the purpose of pointing out that it is the readiness of the vessel as a vessel to receive the cargo that is the determining factor as to when the lay days are to commence. Lay days do not connote an obligation to load, but that the vessel shall load within a certain number of days. If the vessel has to go to a dock, it is sufficient if she gets into the dock. There is no difference between a dock and a port. The expression "usual place of discharge" or "usual loading place" means an area of the place, and not the actual spot at which the vessel must discharge or load. It is clear from the decision in *Pyman* v. *Dreyfus* (1) that the vessel is at the usual place of discharge if she arrives at the business part of the port. In the present case the finding of fact by Channell J. is that it was usual to discharge at berths, and the vessel was in exactly the same position as that in *Pyman* v. *Dreyfus*. (1) She was as near to the discharging berth as she could get having regard to the presence of the other vessels. Channell J. has not found that the *Leonis* was not within the commercial area of the port. In *Davies* v. *McVeagh* (3) the vessel was ordered to go to a dock, and there was a peculiar description of the dock. *Pyman* v. *Dreyfus* (1) has never been overruled or discredited, and Channell J. misconceived the effect of the decision in that case. *Brown* v. *Johnson* (4) and *Brereton* v. *Chapman* (5) were decided upon their own particular facts,

(1) 24 Q. B. D. 152.
(2) 27 L. J. (Q. B.) 49; 7 E. & B. 942.
(3) 4 Ex. D. 265.
(4) 10 M. & W. 331.
(5) 7 Bing. 559.

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and *The Felix* (1) does not support the view that in the absence of any special provision in the charterparty the charterer has the implied right to require the vessel to get to a usual loading berth in the shipowner's time.

Cur. adv. vult.

Nov. 21. LORD ALVERSTONE C.J. I concur in the judgments which my brothers are about to deliver, and I do not wish to deliver a separate judgment.

BUCKLEY L.J. read the following judgment:—In this case the charter provided that the ship should proceed as ordered by the charterers to a safe loading port or place in the river Paraná and there receive a cargo. By article 22 lay days were fixed, and by article 23 the cargo was to be loaded at the rate of 200 tons per running day, the time for loading to commence twelve hours after written notice to be given by the master to the charterers that the vessel is in readiness to receive cargo. The vessel was ordered to Bahia Blanca. She arrived there on February 24, and anchored about three ship's lengths from the railway pier. The charterers desired her to go alongside the pier, but as all berths alongside the pier were full she was unable to do so for more than a month. The question for decision is whether she was an arrived ship on February 24 and the lay days then began, or whether the commencement of the lay days was postponed until she got a berth alongside the pier.

The learned judge has found that the place where the vessel anchored on February 24 was a possible loading place, but not the usual loading place, and on that finding has held that the lay days commence at the latter date. I have learned from the arguments to which I have had the advantage of listening that upon the question involved in this and similar cases there exist a large number of authorities which it is not easy to reconcile. I have to state the conclusion at which I have arrived after having read and considered them.

Upon the question of the date at which a ship is an arrived

(1) L. R. 2 A. & E. 273.

ship, or, in other words, the date when the carrying voyage is ended, I find the following:—In *Postlethwaite* v. *Freeland* (1) Lord Selborne said: "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo when a ship which has been chartered arrives at its destination and is ready to discharge lies (generally) upon the charterer." James L.J. in *Nelson* v. *Dahl* (2), after saying that "it is more reasonable to hold that the voyage qua voyage, ends where the public highway ends," goes on to say: "The shipowner must, of course, be willing and ready to go into the dock specified, just as he must be willing and ready to proceed when in the dock to a proper berth assigned to him for unloading. There is, in my mind, a marked and broad distinction between the port of discharge, the usual public place of discharge in that port, which it is the shipowner's business at all events and at his own risk to reach, and the private quay, wharf or warehouse, or private dock, adjoining or near the port, on which or in which he is to co-operate with the merchant in the delivery of the cargo." In the same case Brett L.J. (3) said: "The right of the shipowner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is to end; and the ship is ready, so far as she is concerned, to unload. . . . . If the named place describes as before a large space in several parts of which a ship can unload, as a port or dock, the shipowner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place or the place which by custom is considered to be intended by the name and is ready, so far as the ship is concerned, to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged." In this passage I call attention to the expression "is ready, so far as the ship is concerned, to discharge." It is an expression which will be found employed repeatedly in the judgment. It is an expression which conveys that when the ship is ready, so far as she is concerned, to discharge, it may be that discharge in fact cannot be made because

(1) 5 App. Cas. 599. (2) 12 Ch. D. 568.
(3) 12 Ch. D. 568, at p. 583.

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some one else (of course the charterer) who has to do his part in the discharge is, so far as he is concerned, not ready. The judgments in *Tharsis Sulphur Co.* v. *Morel* (1) are to the like effect. Where the charterparty names a larger place, and not a smaller place within it, the carrying voyage, as I understand those judgments, comes to an end when the ship reaches the larger place. The true proposition, I think, is that where the charter is to discharge in a named place which is a larger area in some part or in several parts of which the ship can discharge, the lay days commence so soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge, notwithstanding that the charterer has not named, or has been unable owing to the crowded state of the port to name, a berth at which in fact the discharge can take place.

In that which follows I shall use the word "berth" to express and include a berth, or a wharf or a quay, or a place where by the use of lighters or other means a vessel can load or discharge, and the words "place of discharge" as meaning a place named in the charterparty of larger area than a berth within which are a berth or berths, and investigate whether the authorities do not support the proposition that under such a charter as this the lay days begin to run when the vessel has reached the place of discharge, but has not reached a berth. The proposition is certainly true where the named place is a dock. It is not disputed that the second proposition in Mr. Carver's work on Carriage by Sea, 4th ed. s. 627 (2.), is correct, namely, that "When a particular dock is named the lay days will begin as soon as the ship is ready, and at the freighter's disposal, inside the dock, though not alongside the quay; even though the work can only take place at the quay." If this is so it is difficult to grasp any ground of principle differentiating a dock from that part of a port at which the ship would be as closely proximate to a berth as she would be in a dock. What logical difference can exist? The ship either is not or is an arrived ship when she has not reached a berth. If she is when the named place is a dock, why is she not when the named place is a port and she is

(1) [1891] 2 Q. B. 647.

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at a place as closely proximate to a berth as she would be in a dock?

Brown v. *Johnson* (1) is an authority that if the named place be a port and the vessel on reaching the port goes into a dock, the lay days commence from her entering the dock, not from her reaching a berth. The vessel there entered the dock on the 2nd, but did not reach the place of unloading until the 4th; and it was held that the lay days began on the 2nd, not on the 4th—that is to say, on the day she entered the dock, not the day when she reached the berth. In *Tapscott* v. *Balfour* (2) the named place was a dock. The vessel got into the dock on July 3, but could not get under the tips (which was the place of loading) until July 11. It was held that the lay days commenced, not when the ship got under the tips, but when she got into the dock. The ground of decision was put by Bovill C.J. in the words that the lay days commence, not upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the dock—not the actual berth at which she loads, but the berth or roadstead where loading usually takes place. He said: "If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port." I point attention to those words—"the usual place of loading in the port." In those words I find an expression of the meaning to be given to what has been called the commercial ambit of the port as distinguished from the whole port in a geographical or maritime sense. It means, not the whole port, but such part of the port as is a proper place for discharging, whether the vessel has reached a berth or not. It is that part of the larger area (the port) which can appropriately be described as the place of discharge, meaning by that expression an area, and not a berth. In *Postlethwaite* v. *Freeland* (3) the vessel had brought up about a mile outside the bar. The facts were that that was a place of discharge in the sense that, if and when it was connected with the shore by the warp which enabled lighters to pass from the

(1) 10 M. & W. 331. (2) L. R. 8 C. P. 46.
(3) 5 App. Cas. 599.

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vessel to the shore, it was a usual place of discharge, but unless and until the use of the warp could be obtained it was not a place of discharge, but a place outside the bar from which discharge could not be made. Lord Blackburn said (1) that had there been lay days in that charterparty they would have begun to run on September 1. I think this is important. It affirms that the lay days begin at the date when the ship has reached a place which is not a berth at the date when she reaches it, but may at a later date, when the use of the warp has been obtained, be a berth. The berth in that case came, so to speak, to the ship instead of the ship coming to the berth. *Brereton* v. *Chapman* (2) is, I think, consistent with this view. The words "usual place of discharge," as there employed, are not used by way of contrast between what I have called a berth and what I have called a place of discharge. The "usual place of discharge" there means an area. *Parker* v. *Winlo* (3), as reported in Ellis & Blackburn, seems to create some difficulty, but the difficulty disappears when the fuller report in the *Law Journal* is referred to. The Court, rightly or wrongly (for this purpose it is immaterial), found that the charter upon its true construction was as if it had expressed the obligation to be to go to Brunswick Wharf. "The effect of it," said Crompton J., "is the same as if the contract had been to go to Brunswick Wharf." This being so, the case falls into the category of cases which I shall next mention, viz., those of which *Tharsis Sulphur Co.* v. *Morel* (4) is an instance.

There is another group of authorities not directly in point upon the case of a charterparty in the form of the present charterparty, but most instructive, I think, upon the question for determination. They are cases of which *Tharsis Sulphur Co.* v. *Morel* (4) is the salient and principal authority, viz., cases where the charterparty provides that, or to the effect that, the ship shall deliver at a berth "as ordered"; in that case it was "at any safe berth as ordered on arrival in the dock at Garston." It

(1) 5 App. Cas. at p. 618.
(2) 7 Bing. 559.
(3) 27 L. J. (Q.B.) 49; 7 E. & B. 942.
(4) [1891] 2 Q. B. 647.

has been decided in *The Felix* (1), and nobody, upon the argument before us, has disputed, that even in the absence of an express provision enabling the charterer to name the berth, the shipowner must obey the charterer's instructions as to the berth in the named place to which the vessel shall be brought to discharge. That case left open the question at whose expense she is to go there. But the authorities to which I am referring shew that, if not by implication, but by express words, the charterer is entitled to name the berth, the lay days do not commence until the ship has reached the berth which the charterer indicates, and those authorities are rested upon the fact that the charter does contain such an express power in the charterer to name the berth.

The respondents have argued before us that the case is the same where the right of the charterer to name the berth arises, not from express words, but from the application of the rule in *The Felix*. (1) If this be true, the whole ground of the decisions in *Tharsis Sulphur Co.* v. *Morel* (2) and cases of that kind is swept away, for their decision is rested upon the fact that the charterparty does contain an express authority to name the berth, which the argument assumes to be an irrelevant consideration. In *Tharsis Sulphur Co.* v. *Morel* (2) I find that Lord Esher M.R., after stating that the charter was to carry to Garston Dock, said this: "If that were all, the carrying voyage would end at Garston Dock, but it is not all, for the vessel is to deliver at any safe berth as ordered." His decision, in which he was applying *Nelson* v. *Dahl* (3), as I understand it, was that the lay days commenced from the time when the vessel was berthed, for this reason, and this reason only, that the charterparty was for delivery at a berth as ordered. The same is true of Bowen L.J.'s judgment. He puts the case of a larger place and a smaller place within the larger being named in the charterparty, and says that it is an untenable contention that in that case the voyage ends on arrival at the larger place. The reasoning of the judgment has no basis, unless he was discriminating both that case and the case where the charterparty names a

(1) L. R. 2 A. & E. 273. (2) [1891] 2 Q. B. 647.
(3) 12 Ch. D. 568.

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larger place and does not name a smaller place within the larger.

Other cases of this description are *Murphy* v. *Coffin* (1), *Good* v. *Isaacs* (2), *Bulman* v. *Fenwick* (3), and *Sanders* v. *Jenkins*. (4) The last was a case which proceeded upon the admission which counsel had made, that the charterparty in that case was in such a form as that the words "as ordered" were to be read into it. *The Carisbrook* (5) was by *Tharsis Sulphur Co.* v. *Morel* (6) overruled because the charterparty contained the words "as ordered." Having regard to those authorities, it seems to me impossible to maintain that the case is the same where the charterer requires the ship to go to a particular berth under the rule in *The Felix* (7) and where he orders her there under express words in the charter. In the former case the carrying voyage has ended before, and in the latter has not ended until, the ship is in the berth required. The difficulty of *Davies* v. *McVeagh* (8) has been much exaggerated. Once arrive at the conclusion that upon the true construction of the charterparty the named place was the Wellington Dock, and not a particular portion of it, and the case falls into line and becomes but another instance of the rule which I have endeavoured to state, and the language of Bramwell L.J., in discriminating the place of loading and the spot of loading, becomes a vivid and, I think, an accurate definition. The authorities, therefore, which I set out to examine do, in my opinion, support the proposition that under such a charter as the present the lay days begin to run when the vessel has reached the place of discharge but has not reached a berth.

Pyman v. *Dreyfus* (9) was decided in 1889. I am unable to find that doubt of, or dissent from, the case has ever been expressed. It is not the practice of this Court, where a question of frequent mercantile interest has been decided and has stood without question for nearly twenty years, to overrule it unless it be plainly wrong. For the reasons which I have given I think

(1) 12 Q. B. D. 87.
(2) [1892] 2 Q. B. 555.
(3) [1894] 1 Q. B. 179.
(4) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(5) 15 P. D. 98.
(6) [1891] 2 Q. B. 647.
(7) L. R. 2 A. & E. 273.
(8) 4 Ex. D. 265.
(9) 24 Q. B. D. 152.

it is right, and at any rate I think we should not disturb it. The proposition which it affirms seems to me to have been this: that under a charterparty which names an area, but not expressly or by the words "as ordered" a berth, the lay days run from the time when the ship arrives in the named place of larger area (in that case it was the outer harbour of Odessa), and is at the disposition of the charterers for loading, and none the less because the charterers had not by express words in the charter, but under the rule in *The Felix* (1), the right to indicate the particular berth to which she was to go. The facts were that there were no practicable means of loading her except at a quay berth, and that a quay berth could not at the time of her arrival be obtained. That contingency was one the burden of which falls, not on the shipowner, but on the charterer. *Pyman* v. *Dreyfus* (2), I think, is good law, and it governs this case. The lay days here began, I think, when the vessel anchored near the railway pier. The appellants, therefore, are entitled to succeed.

KENNEDY L.J. read the following judgment:—I am of opinion that the appeal in this case ought to be allowed. The law respecting the relative obligations of shipowner and charterer under a simple form of charterparty such as that which existed in the present case is, I think, clear. The ship is to proceed to a named destination, and when she has arrived at that destination her master has to give the charterer, or his representative there, notice of her readiness to load the chartered cargo, and the ship must be ready to load so far as she is concerned. The charterer on his part binds himself to complete the loading within a definite period of time computed in the charterparty either by a number of days or by a specified daily rate of loading, and commencing so many hours or so many days (as the case may be) after the master of the ship has given notice of the ship being ready to load as above mentioned. The ship's obligations, therefore, under such a charterparty, the performance of which must precede the commencement of the lay days (as the fixed loading period is commonly termed) are three. First, the ship must have arrived at her destination, and so be within the

(1) L. R. 2 A. & E. 273. (2) 24 Q. B. D. 152.

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designation of an "arrived" ship. Till then she is not entitled to give notice of readiness to load. Secondly, she must have given the prescribed notice of readiness to load. Thirdly, she must in fact be, so far as she is concerned, ready to load. The shipowner cannot claim against the charterer that the lay days begin to count until the ship is an "arrived" ship; the prescribed notice has been given and expired; and in fact the ship is ready, so far as she is concerned, to receive the cargo. Now, the answer to the inquiry whether the ship can or cannot properly be described as an "arrived" ship obviously depends upon the point which the parties have chosen to designate in the charterparty as the destination. The degree of precision is purely a matter of agreement between them. In practice, the destination is generally one of the following: (1.) A port; (2.) a specified area within a port, such, e.g., as a basin, a dock, or a certain distance or reach of shore on the seacoast or in a river; or (3.) the still more limited and precise point where the physical act of loading is to take place, as, e.g., a particular quay, pier, wharf or spout, or (where the operation is to be performed by means of lighters, and the ship is not to be in a shore berth) a particular mooring. In each of the last two cases—(2.) and (3.)—it is settled law that the point of destination is equally to be treated as designated in the charterparty, whether the point be named in the document by its local title or there is in the charterparty an express reservation to the charterer of the privilege to fix the point of destination by his order or direction, as, e.g., *Tapscott* v. *Balfour* (1), *Murphy* v. *Coffin* (2), *Tharsis Sulphur Co.* v. *Morel* (3), and *Bulman* v. *Fenwick*. (4) If the stipulated point of destination is either (2.) or (3.), the answer to the question as to whether the ship is or is not an "arrived" ship is generally plain enough. It depends on an absolutely simple fact, viz., her being or not being in the one case within the specified area, or, in the other case, at the narrower and more limited point of destination. It is when the stipulated point of destination is a port only without further limitation, as in the present case, that a question as to the fact of the ship's arrival at her destination is likely to

(1) L. R. 8 C. P. 46.
(2) 12 Q. B. D. 87.
(3) [1891] 2 Q. B. 647.
(4) [1894] 1 Q. B. 179.

arise. The limits of a port established by law or ancient custom may be very wide; or, again, in the case of a newly-established place of shipping traffic, the limits may be uncertain because not yet defined by any competent authority. The ports of London and Liverpool are instances of the first class; for aught I know Bahia Blanca may be an instance of the second. But even in this event the law appears to me to be now settled. In the case of a port, and nothing more, being designated in a charterparty as the point of destination our Courts have acted in accordance with those dictates of reason and practical expediency which ought to be paramount especially in the region of mercantile business. Just as a port may have one set of limits, if viewed geographically, and another for fiscal or for pilotage purposes, so when it is named in a commercial document, and for commercial purposes, the term is to be construed in a commercial sense in relation to the objects of the particular transaction. Thus in *Sailing Ship Garston Co.* v. *Hickie* (1) Lord Esher M.R., in a passage quoted by A. L. Smith L.J. in the subsequent case of *In re Goodbody and Balfour, Williamson & Co.* (2), observed: "The word 'port' in a charterparty does not necessarily mean an Act of Parliament pilotage port, or, which is the better word, 'pilotage district.' Therefore, when you are trying to define a port with regard to which persons who enter into a charterparty are contracting, you endeavour to find words which will shut out those things which you know they do not intend. What do they intend? They intend the port as commonly understood by all persons who are using it as a port, that is, for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels, and shipowners. What do all those persons in their ordinary language mean by a port? What they understand by the word is the 'port' in its ordinary sense, in its business sense, in its popular sense, that is to say, the popular sense of such persons. It is also the port in its commercial sense, for with them 'business' means commercial business." And so in *Brown* v. *Johnson* (3) the Court of Exchequer held that the lay

(1) (1885) 15 Q. B. D. 580, at p. 587.

(2) (1899) 5 Com. Cas. 59, at p. 66.

(3) 10 M. & W. 331.

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days did not commence on entering the geographical limits of the port of Hull, Lord Abinger observing that the lay days certainly did not commence at the period of entering the port, as that might be very extensive—for instance, Gravesend is part of the port of London. And so, again, in *Kell* v. *Anderson* (1), when the port of discharge named in the charterparty was London, the ship was held not to have arrived at her destination when she reached Gravesend, which, as Lord Abinger stated in the passage I have just quoted, is within the geographical and legal limits of the port of London. If, then, we find a charterparty naming a "port" simply, and without further particularity or qualification, as the destination for the purpose of loading or unloading, we must construe it in regard to the "arrival" of the ship at that destination as meaning that port in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business, and in regard to the arrival of a ship there for the purposes of the charterparty. In the case of a small port, "port" may or may not mean the whole of the geographical port. In the case of a widely extended area, such as London, Liverpool or Hull, it certainly signifies some area which is less than the geographical port, and which may, I think, not unfitly be called the commercial area.

But then comes the question what does the expression the "port," viewed commercially, or the "commercial area" in this connection mean? Certainly it does not mean the loading berth, that is to say, the actual spot at which the work of loading or unloading the ship is performed. As Channell J. remarks in his judgment in the present case: "It would be very peculiar if there were a greater obligation on the ship to go to a specific berth when the charterparty was less specific by naming a port only than where it was more specific and named a dock." It may, indeed, be open to a charterer to prove in regard either to a loading or to a discharging ship that there is a recognized and established custom of the port not to treat a ship as being an "arrived" ship until she reaches a particular spot. There is authority for this in the judgment of the Common Pleas Division (Coleridge C.J. and Brett and Lindley JJ.) in 1876 in

(1) (1842) 10 M. & W. 498.

Norden Steamship Co. v. *Dempsey.* (1) In that case the destination of a timber-laden ship was, according to the charterparty, Liverpool, with a marginal note, "Discharging dock to be ordered on arrival of steamer at Liverpool." It was proposed by the charterer's counsel to ask a witness, "Is there any custom in the port of Liverpool, with regard to ships in the timber trade, as to when they are deemed to have arrived at their usual place of discharge?" Lush J., the judge at the trial, rejected the question. The Divisional Court ordered a new trial. Lord Coleridge C.J., in the course of his judgment, said: "Principle and authority have alike decided that where the question is what particular part of an extensive port a vessel must have reached before she can be said to have arrived at her destination, evidence may be given as to the usage of the port in that respect"; and Brett J., at the close of his judgment, observed that *Brereton* v. *Chapman* (2), a case in which the custom of the port of Wells not to treat a vessel as an arrived ship until she reached the quay was proved, was an authority in favour of the Court's decision. "Practically," said the learned judge, "the very question now objected to was asked there. I think the question was admissible, because it was a question tending to solve the fundamental question, when was that ship an arrived ship?" In the absence of any proof of a custom of this kind—and I may note in passing that no evidence of such a custom was given in the present case—the commercial area of a port, arrival within which makes the ship an arrived ship, and, as such, entitled to give notice of readiness to load, and at the expiration of the notice to begin to count lay days, ought, I think, to be that area of the named port of destination on arrival within which the master can effectively place his ship at the disposal of the charterer, the vessel herself being then, so far as she is concerned, ready to load, and as near as circumstances permit to the actual loading "spot" (I use the convenient word which was employed by Denman J. in *Tapscott* v. *Balfour* (3) and by Bramwell L.J. in *Davies* v. *McVeagh* (4)), be it quay or wharf, or pier, or mooring, and in a place where ships waiting for access to that spot usually lie, or, if there

(1) (1876) 1 C. P. D. 654.
(2) 7 Bing. 559.
(3) L. R. 8 C. P. 46.
(4) 4 Ex. D. 265.

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be more such loading spots than one, as near as circumstances permit to that one of such spots which the charterer prefers. That is the point of arrival indicated by Mathew J. in his judgment in *Pyman* v. *Dreyfus* (1), where he speaks of the vessel then in an outer dock as having arrived (her charterparty destination was simply "Odessa") at a point where she was at the disposition of the charterer. "They had only to indicate," said the learned judge, "the place to which she was to go for her cargo, and she would have been there immediately." It is the point of arrival intended by Brett L.J. in his judgment in the case of *Nelson* v. *Dahl* (2) (which has been described by Mathew J. in his judgment in *Pyman* v. *Dreyfus* (1) as containing a valuable epitome of all the previous authorities) when he used the words, "if a larger port be named, the usual place in it at which loading vessels lie." It is "the dock or roadstead where loading usually takes place" which Bovill C.J. in *Tapscott* v. *Balfour* (3) contrasts with the actual berth at which the vessel loads. The learned counsel for the respondents, in the course of his argument before us, contended that by the words which I have just quoted, "the usual place in it at which loading vessels lie," Brett L.J. meant the usual wharf or quay, or similar spot at which the ship is berthed and the actual work of loading takes place. In my judgment such an interpretation is erroneous. It would create the "very peculiar" inconsistency of rule which my brother Channell points out in his judgment, and it is inconsistent with the immediately preceding context in Brett L.J.'s judgment, "if it" (i.e., the charterparty) "describes a larger place as a port or dock the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and, so far as she is concerned, is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded." It is also in my view inconsistent with the language of the same judgment which immediately follows: "If it" (that is, the charterparty) "describes a more limited place, as a quay or quay berth, or a particular part of a port or dock, the shipowner may place his

(1) 24 Q. B. D. 152. (2) 12 Ch. D. 568.
(3) L. R. 8 C. P. 46.

ship at the disposition of the charterer when the ship is arrived at that place ready, so far as she is concerned, to load, but not until the ship is at that place." What Brett L.J. meant by the words "usual place at which loading ships lie," as what Bovill C.J. also meant by "the dock or roadstead where loading usually takes place," is the area in the port within which vessels whose obligation and purpose is to receive a cargo lie; in other words, that which I have ventured to describe as the commercial port, or the commercial area within the port, which is usually occupied by such vessels. The proposition which is stated by Mr. Carver at pp. 751 and 752 (s. 624a) of the 4th edition of his most valuable work on Carriage by Sea, and is restated at p. 760 (s. 627), appears to me to be entirely right: "When the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place in its commercial sense; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go."

The facts to which the law has to be applied in the present case are few, and really undisputed. The steamship *Leonis* was chartered by her owners to the defendants. She was to go to Montevideo for orders to proceed to one or other of certain South American ports in the river Paraná, including Bahia Blanca, and there load. She was ordered by the charterers, the defendants in the present action, to Bahia Blanca. The charterparty provided that the lay days were to begin twelve hours after notice that the ship was ready to load, and she was to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted. Should the steamer not be ready to load by 6 P.M. on March 15, 1905, the charterers had the option of cancelling the charterparty. Bahia Blanca is a port at which cereals (and it was wheat which the charterers were to load) are usually loaded alongside the railway pier or mole jutting out into the river, to which railway trucks come with the cargo. The *Leonis* arrived at Bahia Blanca on February 24, 1905. The river was crowded with shipping waiting to be loaded, and the loading space alongside

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the pier—the spot where the charterer desired the ship to receive her cargo—then was, and it continued to be, occupied by other vessels, and so the *Leonis* on her arrival anchored, as Channell J. states in his judgment, in the river, within the port, only a few ship's lengths off the pier, and, as appears from the evidence, in the usual place where steamers lie whilst waiting for a berth at the pier. Her master then gave notice that the ship was ready to load. The crowded state of the port continued for a long while to prevent her from getting a berth at the pier, and the *Leonis* lay at her anchorage until March 28. On March 29 the *Leonis* was ordered to go alongside another vessel which was berthed alongside the pier, and she did so, and she there received some cargo from a lighter. The next day, March 30, the *Leonis* got a berth alongside the pier, and her loading was completed on April 5. The plaintiffs claimed demurrage upon the basis of the commencement of the lay days from the expiration of the notice of readiness to load. The defendants resisted this claim, and asserted that the lay days did not commence until the *Leonis* was berthed alongside the pier. My brother Channell decided in favour of the defendants, upon the ground, as it is reported in the *Law Reports* (1), that he inferred from the evidence that the place where the *Leonis* anchored was not the usual loading place, but was merely a possible loading place, and that the time taken in getting into a berth cannot be included in the lay days. In his own note the judgment for the defendants is stated to be on the ground that there was no arrival at the usual loading place until arrival at the actual loading place.

Now the facts in this case, as I have already said, are not in dispute, and, whilst I cannot concur in his conclusion, I concur substantially, subject to one exception, which I shall mention directly, in the reasoning of the learned judge throughout the judgment on the points of law which were raised before him. I concur in his explanation of the judgment of Collins J. in the case of *Sanders* v. *Jenkins* (2), and in his own clearly reasoned disapproval of the contention of the defendants which was made before him, and which formed, indeed, the principal part of the defendant's argument

(1) [1907] 1 K. B. 344, at p. 355. (2) [1897] 1 Q. B. 93; 2 Com. Cas. 12.

in this Court, that because, as Sir Robert Phillimore held in *The Felix* (1), there is an obligation on the ship to go to the berth selected by the charterer, therefore, even in a charterparty which fixes a port only or a dock only as the destination, and makes the lay days commence from the expiration of the notice of readiness to load, the lay days commence to run only when the ship has arrived at the particular berth which the charterer selects for the loading. Channell J. points out in his judgment: "The existence of this" (the ship's) "obligation is quite consistent with its being performed in the shipowner's time, that is, before the lay days commence, or in the charterer's time, that is, after the lay days commence, and you must, I think, look to the terms of the charterparty, and to the rules for its construction to see in whose time it is that the getting to the berth selected is to be done." Looking to those rules which are embodied in judicial decisions of which *Tapscott* v. *Balfour* (2) and *Pyman* v. *Dreyfus* (3) are reported and well-known samples, Channell J. justly observes that the defendants' suggested rule really involves giving the go-by to some score of cases. It is to be observed that in the case of *The Felix* (1) no question of demurrage arose for decision, nor was any question raised as to the date from which lay days would begin to run. The argument put forward by the respondents on this appeal is an attempt to destroy the distinction rightly, I think, recognized by Mr. Carver in the propositions laid down at p. 760 of his work, between the cases in which the charterparty either names a definite spot in a port or dock as the destination, or gives the charterer in express terms the right to order a vessel to a definite spot —as in *Tharsis Sulphur Co.* v. *Morel* (4)—as the destination, and the cases in which the charterer, who must, generally speaking, have his cargo ready to be put on board, has only an implied right to choose for loading a spot or berth in a dock or port. This implied right *The Felix* (1) does indeed support, but without affording thereby any reasonable inference that that implied right is to alter or interfere with the express stipulations of the charterparty as to the commencement of the lay days.

(1) L. R. 2 A. & E. 273.
(2) L. R. 8 C. P. 46.
(3) 24 Q. B. D. 152.
(4) [1891] 2 Q. B. 647.

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That which has misled Channell J. into giving judgment, nevertheless, in the defendants' favour is apparently an interpretation which seems to me to be wrong (I say this, I need not say, with most sincere respect to a learned judge from whom in a matter of this kind I should always be slow to differ) as to the meaning of such expressions as "usual place of loading," "usual place of delivery" (in regard to the port of loading or discharge), which are to be found in some of the reported judgments relating to the obligation resting upon the shipowner before he can claim that his ship is an "arrived" ship, and that the lay days are to commence. The learned judge has treated such expressions as meaning by the word "place" or "usual place" the actual spot or berth (here a spot or berth at the railway pier) at which the physical work of loading or unloading is done. I am clearly of opinion that in every case where, a port (or a wide district like a port) being the destination named in the charterparty, the word "place," or "usual place of loading or discharge," is found in the judgments, the expression has been intended to mean, not that "spot" or berth, but the larger area within the legal or geographical port which forms the "commercial port," or "the commercial area within the port," on arrival within which the master of the ship can truly say to the charterer, "My ship is an arrived ship; she is at your disposal, she is ready to discharge so far as she is concerned." It is this which is intended by Brett L.J., as I have already said, by the phrase "the usual place in the port where loading ships lie," and by Mathew J., in *Pyman* v. *Dreyfus* (1), when he speaks of the point where the ship was at the disposition of the charterers on her arrival and at which they had only to indicate the place to which she was to go for her cargo and she would have been there immediately.

The result is that, whilst my brother Channell has said in his judgment that he must follow the rule as stated by Brett L.J. in *Nelson* v. *Dahl* (2), followed in *Pyman* v. *Dreyfus* (1), the learned judge has in his decision, contrary, as it seems to me, to the judgments in those cases, treated a shipowner for whom the charterparty fixes a port only as the destination as if it had specified as the destination a berth at the pier in that port

(1) 24 Q. B. D. 152. (2) 12 Ch. D. 568.

because the actual work of loading is usually done when the ship is alongside that pier. In my opinion, on grounds both of principle and of authority, such a decision cannot be upheld. It appears to me that when the *Leonis* reached the anchorage within the port of Bahia Blanca close to the pier, alongside which the actual loading can and usually does take place and where the charterer desired her to load, and when she was at that anchorage in the area within which, according to the evidence, steamers usually lie awaiting their turn at the pier, she was an "arrived" ship and, inasmuch as she was there, and, so far as she was concerned, ready to load, she was entitled to give the notice after which on the expiration of twelve hours the lay days were to begin. If, as she then lay, she was then an "arrived" ship at the charterers' disposal, and ready to load, it is, under such a charterparty as the present charterparty of the *Leonis*, immaterial whether she was in a place in which the physical act of loading was possible or impossible.

I will only add one remark as to the cancelling clause, not as an argument against the defendants' contention, but as an illustration of the improbability of the intention of the business men who entered into this charterparty being that which the defendants' contention suggests. The charterer has an option to cancel should the vessel not be ready to load by 6 P.M. on March 15. She did not in fact reach the berth at the pier until March 30. On March 29 she first left her anchorage to go alongside another vessel which had the inner berth alongside the pier. Could the charterers at any time between March 15 and March 28, whilst the *Leonis* was lying at her anchorage, have said to the owners, "Your ship is not ready to load, and, therefore, we cancel the charterparty?" It appears to me very difficult, if not impossible, to suppose that such a thing could be within the intention of the parties. But if the charterers could not properly assert this, if the ship was whilst at her anchorage an "arrived" ship ready to load, why should not the notice of readiness to load, after the expiration of which the lay days were, according to the charterparty, to commence, be a valid and effectual notice for that purpose? Be this as it may, for the reasons both of principle and of authority, which I have felt it

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to be my duty to set forth at some length because we are reversing the judgment in the Court below in a matter of general importance to those who are engaged in a very important branch of mercantile business, I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for defendants: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

J. E. A.

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[IN THE COURT OF APPEAL.]

CAIRN LINE OF STEAMSHIPS, LIMITED *v.* CORPORATION OF TRINITY HOUSE.

Ship—Tonnage—"Deck Cargo"—Coal carried on Deck for Use on Voyage—"Timber, Stores, or other Goods"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 85.

Coals carried in an uncovered space upon the deck of a ship, though intended for use in the ship's fires upon the voyage, come within the words "stores or other goods," and are carried "as deck cargo," within the meaning of s. 85 of the Merchant Shipping Act, 1894.

Dicta in *Richmond Hill Steamship Co.* v. *Corporation of Trinity House*, [1896] 2 Q. B. 134, not followed.

APPEAL from the judgment of Bray J. on trial of action without a jury. (1)

The plaintiffs' steamship *Cairntorr* left Penarth in April, 1906, for a voyage to Buenos Ayres carrying 4924 tons of coal shipped by Messrs. Cory Brothers, Limited, under bills of lading. The said 4924 tons were carried in the ship's holds. In addition the *Cairntorr* took on board 1291 tons of coal, of which 1127 tons were put in the ship's bunkers, 64 tons in the poop, and 100 tons on the awning deck. None of the said 1291 tons were shipped

(1) [1907] 1 K. B. 604.

under bills of lading, or so as to earn freight. They had been bought by the plaintiffs for use on board in the ship's fires. On the voyage out to Buenos Ayres the whole of the said 100 tons stored on the awning deck were transferred therefrom into the thwartship bunkers and consumed in the boiler fires.

The defendants, being the authority charged with the collection of light dues, by the collector of customs at Cardiff as their agent, demanded from the plaintiffs, as due under the Merchant Shipping Act, 1894, and the Merchant Shipping (Mercantile Marine Fund) Act, 1898, in respect of the *Cairntorr* and in respect of the said voyage, light dues amounting to 6*s.* 10*d.* on the tonnage space occupied by the 100 tons of coal stored on the awning deck. The plaintiffs, in order to get their ship cleared at the customs house and to prevent her being detained, paid the sum demanded under protest, and brought the action to recover it back.

By s. 5, sub-s. 2, of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, and the Second Schedule to that Act, the scale of light dues payable by a foreign-going ship is $2\frac{3}{4}d.$ per ton per voyage. For the plaintiffs it was contended that the space occupied by the coal on deck was no part of the tonnage of the ship, for, though by s. 85 (1) of the Merchant Shipping Act, 1894, it is provided that where a foreign-going ship "carries as deck cargo, that is to say, in any uncovered space upon deck . . . . timber, stores, or other goods," the space occupied by those goods is to be added to the registered tonnage for the purposes of all dues payable on the ship's tonnage, the coal, being carried for consumption on the voyage, was not carried as "cargo," and therefore not as "deck cargo" within the section. Bray J. held that the words "deck cargo" were not confined to freight-earning cargo, and that the coals in question came within the words

(1) By s. 85, sub-s. 1, of the Merchant Shipping Act, 1894: "If any ship, British or foreign, other than a home trade ship as defined by this Act, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable."

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"stores or other goods," and he accordingly held that light dues were payable in respect of the space occupied by them. The plaintiffs appealed.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiffs. The coals in question were not carried as "deck cargo." The decision of Bray J. gives no value to the word "cargo." He reads the section as if it were not there, and as if the words meant "carries on deck." "Cargo" in its ordinary signification means goods which are carried to a port of destination for the purpose of earning freight, and does not include goods which are carried for consumption on the voyage. That ordinary meaning of the term is not in any way cut down by the definition which follows—"that is to say, &c." Those words only define the word "deck" in the phrase "deck cargo," and leave the meaning of the word "cargo" untouched. The tonnage space below deck is prima facie devoted to the carriage of goods, but, as the whole of it cannot in fact be so devoted, a deduction is made in s. 78, sub-s. 1, for the space occupied by the propelling power, "for the proper working of the boilers and machinery," which space necessarily includes that occupied by the coal bunkers. Above deck the presumption is the other way. The whole of the deck is prima facie intended to be used for the propulsion of the ship, and not for the carriage of cargo. And the policy of the section is that, if a part of the deck space is given up to the carriage of cargo, you are to add to the tonnage space in respect of which dues are to be paid so much of the deck space as is actually occupied by the cargo so carried there. It was not intended that dues should be paid in respect of deck space occupied by coal intended for the propulsion of the ship any more than in respect of space below deck occupied by such coal. In *Richmond Hill Steamship Co.* v. *Corporation of Trinity House* (1), Lord Esher said: "The provisions of s. 23 of the Merchant Shipping Act, 1876"—the terms of which section are identical with those of s. 85 of the Act of 1894—"appear to be directed to cases in which a shipowner uses the deck of his ship as if it were the hold by carrying cargo upon it, and so earning

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freight for such carriage." And Kay L.J. and A. L. Smith L.J. there equally assumed that no deck-laden goods would come within the section unless they were carried as part of the cargo. Further, the coals in question here do not come within the words "timber, stores, or other goods." The timber and other goods there referred to mean timber and other goods when carried as part of the cargo. Lord Esher in the *Richmond Hill Steamship Co.'s Case* (1) said: "I think we ought to construe the word 'goods' as including . . . . anything . . . . that may be carried as cargo on deck." Therefore ship's fuel does not come within the word "goods." Nor does it come within the word "stores," for, as was pointed out by Kay L.J. in that case, "stores belonging to the ship herself would not be cargo." "Stores" there probably refers to stores intended for the fitting out of other ships. In the list of exemptions from light dues at the end of Sched. II. to the Merchant Shipping (Mercantile Marine Fund) Act, 1898, come "Ships putting in for bunker coal, stores, or provisions for their own use on board," so that there the word "stores" is used as not including bunker coal.

Arthur Cohen, K.C., and *Bateson*, for the respondents. The scheme of the portion of the Merchant Shipping Act, 1894, dealing with measurement of ship and tonnage—ss. 77 to 88—is this: The tonnage capacity of the whole interior of the ship is first taken, and from that gross figure there is deducted a certain amount of space sufficient for the normal accommodation of the crew and stores, and the propelling power, including under the latter term the boilers, machinery, and fuel. But the amount so deducted must not exceed a certain proportion of the ship's gross tonnage. Any space occupied by fuel over and above that allowed in such deduction is not exempt from the payment of light dues, even though it is carried below deck. There is no reason, then, why such fuel should be exempt if carried above deck. The words "carries as deck cargo" mean nothing more than "carries on deck." Sect. 85 is taken from s. 23 of the Act of 1876, Mr. Plimsoll's Act, the object of which was to secure the safety of the ship. And, having regard to that object, it must be

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perfectly irrelevant to consider whether the cargo laden on deck is freight-earning cargo or not.

J. A. Hamilton, K.C., in reply.

LORD ALVERSTONE C.J. This case is, I think, by no means free from difficulty, but, after hearing the arguments addressed to us, I have come to the conclusion that the judgment of Bray J. was right. The question turns upon the construction of s. 85 of the Merchant Shipping Act, 1894, and the first point to be decided is what is meant by the words "carries as deck cargo." It is contended by Mr. Hamilton that they mean "carries as part of the freight-earning cargo to be transported in the ship." But that contention overlooks the object of the section, which was to ensure that the proper amount of the dues, which are based on the ship's carrying capacity, shall be paid. The words "that is to say &c.," which follow the words "deck cargo," define only the place where the goods are carried, and do not in any way define the purpose for which they are carried. And "deck cargo" is to be understood as including anything carried on deck in some space not already included in the measurement of the ship's cargo-carrying capacity. The "timber" mentioned in the section does not necessarily mean timber carried for purposes of freight; I think it may include timber carried for the use of the ship upon the voyage. And the word "stores" would certainly include the ship's stores. I had a doubt for some time whether the expression "other goods" ought to include coal intended for the use of the ship, because in s. 81 I find "fuel" contrasted with "cargo" and "stores"; and in s. 78 it is provided that "goods and stores shall not be stowed or carried in any space measured for propelling power," a space which clearly includes the coal bunkers, so that for the purposes of that section the word "goods" does not include bunker coal. But, having regard to the object of s. 85, I think that we ought not so to limit the meaning of the expression "other goods" in that section, and that, if the shipowner chooses to put on deck coals intended for the ship's use, it is proper for the purpose of that section to read the words "other goods" as including that coal. The only other question is whether we are precluded from so holding by the case of

Richmond Hill Steamship Co. v. *Corporation of Trinity House*. (1) But the dicta in that case to the effect that the corresponding section of the Act of 1876 was directed to the case of a shipowner earning freight by carrying cargo on deck were obiter only. The horses in that case were admittedly cargo, and the point suggested in those dicta was never raised or discussed. So far as the decision in that case goes, it is an authority here against the appellants, for it shews that the words "other goods" ought not to have a limited construction put upon them, but are a comprehensive term wide enough to include horses, and, therefore, presumably also coals. I think the appeal ought to be dismissed.

Lord Alverstone C.J.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion. The scheme contemplated by the Act, stating it shortly, appears to be this. You first have to measure the whole internal tonnage capacity of the ship below deck, and in addition the tonnage space of any poop, deckhouse, forecastle, or other permanently closed-in space above deck which is available for cargo or stores or the berthing or accommodation of passengers or crew. Those two figures together represent the whole internal capacity of the ship. Then a limited deduction is allowed from the gross figure thus arrived at for the space occupied by the crew, by the propelling power, and by stores. The net result is the registered tonnage. That being so, the meaning of s. 85 seems to me to be reasonably clear. It seems to have been passed to meet the case of goods being carried in that part of the ship which had not been included in the gross tonnage computation, because in that event, as the shipowner is treating a part of the vessel which was not intended for lading at all as a place where goods are to be laden, that part ought to be treated, for the purpose of the payment of dues, as a part of the tonnage space, which is a space, speaking generally, designed for the carriage of cargo. I think the words "carries as deck cargo" mean nothing more than carries on deck as deck lading, and that the words "timber, stores, or other goods" practically include everything capable of being so laden. If Mr. Hamilton's contention were right, no

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substantial effect could be given to the word "stores" at all. I agree that the appeal must be dismissed.

BUCKLEY L.J. I have come to the same conclusion, but, as the question is not an easy one, I wish to state my reasons for arriving at it. Sect. 85 uses the words "that is to say" after the words "deck cargo," and those words "that is to say" are followed, first, by a statement of place, and, secondly, by a statement of subject-matter. The former of those statements is no doubt a qualification or description of what I may call the adjective "deck," but the latter cannot be regarded as a qualification or description of the noun substantive "cargo," for, if it were, the sentence would contain no object to be governed by the verb "carries." To read the sentence I may transpose the words thus—"carries timber, stores, or other goods as deck cargo, that is to say"; then follows the definition of the word "deck," so that there is nothing left to which the words "that is to say" can refer for the purpose of defining the substantive "cargo." That being so, what is meant by "carries as deck cargo"?—for the word "cargo" is there, and must mean something. Does it mean freight-earning cargo, or does it mean simply load? I should have thought that it meant freight-earning cargo, but for the fact that in s. 451 (now repealed), precisely the same words occur again, "carrying as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, any wood goods." Later in that section I find that the ship's "spare spars or store spars," if there are more than five in number, are within the section, so that the ship's spare spars or store spars are spoken of as cargo. Of course, they are not freight-earning cargo; they are load, and not cargo in the commercial sense of that term. Therefore that leads me to the conclusion that in s. 85, as in s. 451, the words "deck cargo" mean simply deck load, and not freight-earning cargo placed on deck. But that leaves another question, which is a question of difficulty, to be determined. Before I can arrive at the conclusion that the decision of Bray J. is right, I must find that these coals come within the words "timber, stores, or other goods." Then I

am met by this difficulty, that s. 78, sub-s. 3, uses the words "goods or stores" in such a sense that they plainly do not include coal, for in that section, which deals with the measuring of the ship, there is a provision for a deduction in respect of the space occupied by the propelling power, which space admittedly includes the coal bunkers; and sub-s. 3 says that "goods or stores shall not be stowed or carried in any space measured for propelling power." So that if coals are included in "goods or stores," they could not be lawfully loaded in the very space which, it is agreed, is provided for loading them. Under these circumstances I have to ask myself whether the words "stores or other goods," in s. 85 mean the same thing as "goods or stores" in s. 78, for if they do they mean stores or other goods excluding coal. That is the difficulty which has pressed me most; but I do not know that it necessarily follows that they ought to bear the same meaning in the two sections, and, as the other members of the Court take the view that the words "other goods" include these coals, I am not prepared to dissent.

Appeal dismissed.

Solicitors for appellants: *Botherell & Roche.*
Solicitors for respondents: *Sandilands & Co.*

J. F. C.

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ANGLO-AMERICAN OIL COMPANY, LIMITED *v.* MANNING.

Weights and Measures—False or unjust Measure—Possession for Use for Trade —Master and Servant—Possession by Servant for own fraudulent Purpose —Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The appellants owned oil depots, from which a number of tank-waggons were sent out in charge of drivers, each driver being supplied with two five-gallon measures for the purpose of measuring oil sold and delivered to the appellants' customers from the tank-waggon.

At all the depots an engineer was employed to examine all measures used by the tank-waggon drivers, and if a measure was found in any way faulty or unjust, its use was at once discontinued, it was put into a separate part of the appellants' premises, and a new measure without any defects issued in its place. In the ordinary course of business measures withdrawn from use were attended to and their faults or defects rectified.

On March 15, 1907, two measures were supplied to one of the appellants' drivers for use during that day. Each measure was examined by the appellants' engineer and found to be absolutely correct. Measures set aside for repair were accessible to the driver.

The respondent, an inspector of weights and measures, found the driver in Bermondsey on that day in charge of a tank-waggon belonging to the appellants containing oil, and having in his possession two five-gallon measures, one of which was correct, but the other was found to have in the angle formed by the side and bottom thereof, and at the bottom of the measure itself, a quantity of soap, the effect of which was to render it false and unjust to the extent of three and a half pints. The unjust measure belonged to the appellants. One of the correct measures supplied by the appellants to the driver on the morning of March 15, 1907, could not be traced.

The quantity of oil contained in the tank-waggon was measured and booked out against the driver every morning, and similarly checked on his return in the evening of the same day; and the driver did not, either on March 15, 1907, or any previous day, bring back in his tank-waggon more oil than his deliveries during the day accounted for. It was not proved that the appellants were cognizant of the driver's conduct, or that they gave their sanction or approval to the use by him of the unjust measure.

On an information preferred by the respondent against the appellants for that they on March 15, 1907, did, whilst hawking oil from a van in Bermondsey, unlawfully have in their possession for use for trade a false or unjust measure contrary to s. 25 of the Weights and Measures Act, 1878:—

Held, that the Court was at liberty so far to apply the principle which is well settled in reference to civil liability for torts (that an employer

is not liable for fraudulent acts of his servant when committed not in the interests of the employer, but for the individual purposes of profit of the fraudulent servant) as to say that, as the fraudulent driver had the fraudulent measure in his own physical possession for his own fraudulent purposes as distinguished from the interests of his employers, his possession must be deemed to be his own possession, and not the possession of his employers, and that, therefore, the offence with which the appellants were charged had not been made out.

CASE stated by justices for the Newington division of the county of London.

An information was preferred by the respondent Manning, an inspector of weights and measures for the county of London, against the appellants for that they on March 15, 1907, did, whilst hawking oil from a van in George Row, Bermondsey, unlawfully have in their possession for use for trade one measure which was false or unjust, contrary to s. 25 of the Weights and Measures Act, 1878. (1)

Upon the hearing of the information it was proved that the respondent found on March 15, 1907, in Bermondsey, a man named Baldwin, who was in the appellants' service, in charge of a tank-waggon belonging to the appellants containing oil, and having in his possession two five-gallon measures for the purpose of measuring oil sold and delivered to the appellants' customers from the tank-waggon. One of the measures was correct, but the other was found to have in the angle formed by the side and bottom thereof, and at the bottom of the measure itself, a quantity of soap, the effect of which was to render the five-gallon measure false and unjust to the extent of three and a half pints. The false and unjust measure was seized by the inspector and produced before the justices.

On behalf of the appellants evidence was given that the appellants had a depot at Camberwell and that a number of tank-waggons were sent out in charge of drivers, of whom Baldwin

(1) Weights and Measures Act, 1878, s. 25: "Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited."

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was one; that each driver was supplied with two five-gallon measures for the purpose above mentioned. It was alleged by the appellants that at all the depots belonging to them, including the Camberwell depot, an engineer was employed to examine all measures used by the tank-waggon drivers, and that if a measure was found in any way faulty or unjust its use was at once discontinued; that it was put into a separate part of the appellants' premises and a new measure without any defects issued in its place; that in the ordinary course of business such measures withdrawn from use were attended to and their faults or defects rectified.

Further evidence was given that on March 15, 1907, the measures supplied to Baldwin for use during that day were each of them examined by the appellants' engineer and found to be absolutely correct. One of the measures bore an impressed number "1058," the other bearing no number. The unjust measure found in the possession of Baldwin bore an impressed number "693" and belonged to the appellants. The measure marked "1058" supplied to Baldwin had not been traced. Measures set aside for repair were accessible to Baldwin.

Evidence was further given that after Baldwin was stopped by the respondent he returned to the appellants' premises and reported that one of his measures had been taken away from him by the respondent, and that on the condition of the measure seized by the respondent being discovered by the appellants they discharged Baldwin from their service; that the quantity of oil contained in each tank-waggon was measured and booked out against each tank-waggon driver in the morning and similarly checked on his return in the evening of each day; that Baldwin did not, either on March 15 or any previous day, bring back in his tank-waggon more oil than his deliveries during the day accounted for.

It was not proved that the appellants were cognizant of their servant Baldwin's conduct, or that they gave their sanction or approval of the use by him of the unjust measure.

It was contended by the appellants that they were not responsible, under the Weights and Measures Act, 1878, for the possession by Baldwin of the false and unjust measure, as Baldwin was not

acting as the appellants' servant or with their knowledge of the substitution of the false and unjust measure for the true and just measure which had been supplied to him on the morning of March 15, and that Baldwin was not in possession as the appellants' servant of such unjust measure.

The justices were of opinion that every customer of the appellants served by Baldwin with oil, measured by the unjust measure, received three and a half pints less than they were entitled to receive and were defrauded to that extent, and that the appellants had committed an offence against s. 25 of the Weights and Measures Act, 1878, as Baldwin, their servant, was in possession as such servant of a measure which was false or unjust for use for trade.

They accordingly convicted the appellants of the offence charged in the information, and imposed a penalty of 2*s.* 6*d.* and ordered the unjust measure to be forfeited.

The question for the opinion of the Court was whether the justices came to a correct determination in law.

Macmorran, K.C., and *Bodkin*, for the appellants. The question is whether the appellants had in their possession the unjust measure substituted by their servant Baldwin. The measure was not in their possession. It was used fraudulently by their servant, not in the course of his employment, but for his own purpose. The appellants are therefore not criminally responsible for his acts. It is true that the word "knowingly" is not contained in s. 25 of the Weights and Measures Act, 1878. Therefore, if a person in fact had a false measure in his shop, although he was ignorant of the fact, he could probably be convicted under the section of unlawfully having the false measure in his possession for use for trade. But in the present case the false measure was not in the possession of the appellants for use for trade. It was in Baldwin's possession for the purpose of defrauding the appellants. The principle laid down in *Wilson* v. *Rankin* (1) is applicable to the present case. *Coppen* v. *Moore* (2) is distinguishable, as the facts were quite different from those in the present case.

(1) (1865) L. R. 1 Q. B. 162. (2) [1898] 2 Q. B. 306.

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Horace Avory, K.C., and *Daldy*, for the respondent. There is an absolute prohibition in s. 25 of the Weights and Measures Act, 1878, against being in possession of any unjust measure for use for trade. If a master is, by his servant, in possession of a measure which the servant has made unjust, the master is liable. Sect. 59 of the Act of 1878 shews that two kinds of possession were contemplated by the Legislature—(1.) possession by the person carrying on the trade; (2.) possession by means of the measure being on premises where trade is carried on. In the present case the servant was using the unjust measure in the course of his employment. The measure was the property of the appellants, and the fact that the servant was making an improper use of it does not prevent it being in their possession. The servant took it from the appellants' store for the combined purpose of doing his master's business and making profit for himself.

[CHANNELL J. referred to *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1), and *Limpus* v. *London General Omnibus Co.* (2)]

Baldwin could not have been summoned for having the measure in his possession, for his answer would have been that it was not in his possession, but in the possession of the appellants: *Smith* v. *Webb.* (3) He did not take the measure out of the appellants' possession any more than he would have done if he had fraudulently put some soap into the bottom of one of the appellants' cans which he had taken out in the morning: *Collman* v. *Mills.* (4)

Macmorran, K.C., in reply. The circumstances would have been precisely the same, so far as the customers being defrauded goes, if the unjust measure had not been the appellants' property. In both cases the servant would have been using it for his own purposes. By putting the soap in the measure the servant made it a different thing, and he used that thing solely for his own purposes. It was therefore in his possession, not in that of the appellants.

(1) (1887) 18 Q. B. D. 714.
(2) (1862) 1 H. & C. 526.
(3) (1896) 60 J. P. 517.
(4) [1897] 1 Q. B. 396.

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CHANNELL J. In this case we have had very considerable difficulty in arriving at the right conclusion. It seems to raise a very fine point indeed, which depends upon very special circumstances, and upon which our decision will not, we think, to any considerable, if any, extent govern any future cases. In this particular case the appellants were convicted under s. 25 of the Weights and Measures Act, 1878, of having in their possession a false measure for use for trade. The Act of 1878 is within the class of statutes under which persons may be convicted for acts of their servants in respect of which they are not in any real sense culpable. Mens rea is not an element in the offence with which the appellants were charged. The offence is within that class where the Legislature has absolutely prohibited certain acts being done, with the consequence that if they are done, although by a servant of the employer—done in any sense in the course of the employment, so that for some purposes the maxim "Qui facit per alium, facit per se" applies —the employer may be convicted, although he is not in any way morally culpable. In this particular case the appellants have been convicted, and a nominal penalty has been, quite rightly, imposed in reference to the conviction; because it is absolutely clear upon the facts that if the appellants have been brought by the acts of their servant within the provisions of the Weights and Measures Act, 1878, they are not morally culpable in any way, and therefore the justices, having a discretion, quite rightly inflicted a nominal penalty. But although that is the true position, it is, even when the facts are thoroughly understood by the public—and, of course, they are not always thoroughly understood—a somewhat serious thing for a tradesman to have a conviction recorded against him for having in his possession an unjust measure. The appellants, therefore, are perfectly justified in raising, if they can, any technical point (and in this case it is purely technical and an extremely fine one) in order, if possible, to get the conviction quashed. The material facts are that Baldwin, who was in the appellants' employ, was sent out with a travelling tank of oil, and with two measures which are admitted—or at any rate must be assumed—to be perfectly good and just measures, in order that he might by the use of those

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measures sell the oil out of the tank. He was found selling the oil having in his possession at the time one of the measures which had been so given to him in the morning but not the other; in the place of the other he had a measure which was a fraudulent one, but it belonged to the appellants and had their mark upon it. Baldwin had access to defective measures, which had been placed in a separate part of the appellants' premises in order that their defects might be rectified, but it was not strictly proved, and there is no finding in the case as to where the unjust measure in respect of which the information was laid came from. At the time Baldwin was using it it had been turned into a fraudulent measure by a quantity of soap having been put into it, which had so filled up a portion of the measure that it measured three and a half pints less than it ought to have done. Baldwin was obviously committing a fraud on his own account, not in the interests of his employers. He did not commit the fraud in order to obtain for them more money than they ought to have received for their oil, but for his own purpose, in order that out of each sale which he made he might keep the sum which represented the price of the three and a half pints of oil. He used, apparently, to return in the evening with his accounts correct and with the proper quantity of oil, and he also used then to produce the right measures; so that his course of business, or perhaps I ought to say fraud, was that he deposited this fraudulent measure in some convenient place, and when he went out for his day's journey he put one of the genuine and proper measures into that place and hid it for the day; he took out the fraudulent one, used it for fraudulent purposes, and when he returned in the evening he again deposited the fraudulent one in the place where he had been hiding the just one until the next day and produced the just one to the appellants. It was an ingenious system of fraud. The question arises whether or not, upon that state of facts, the defendants were rightly convicted of having in their possession this fraudulent measure for use for trade. Was it in their possession at the time Baldwin was found by the respondent? It was not the measure which had been entrusted to Baldwin for use, but one which he had fraudulently

obtained for the purpose. The point is an extremely fine one. If Baldwin had been in a shop using the measures given to him by the appellants, and he had, whilst he was serving in the shop, made one of the just measures into an unjust one and then used it in the way in which he used this unjust one I cannot doubt that, although the fraud would be identical with that which he committed in the present case, yet the unjust measure would be in the possession of the appellants; the turning of the just measure which was in their possession into an unjust measure would not take it out of their possession, and in that state of things they would have been rightly convicted. That case is as nearly as anything can be the present one. Then there is another case which is also as nearly as possible the present one. Suppose Baldwin, having had the just measure supplied to him by his employers, had had made for himself and for his own use a fraudulent and unjust measure which had never been the property, or in the possession in any way, of the appellants, and used it instead of the just one supplied by the appellants and so committed this fraud. In that case he would be doing as nearly as possible what he did in the present case, and yet in that case I should be of opinion that that fraudulent measure which he had had made for himself in that way never was in the possession of the appellants, his employers; and consequently, in that case, although Baldwin would be committing almost identically the offence which he committed in the present case, the appellants would not have been liable.

The problem we have to solve is whether or not, under the circumstances of this case, the appellants had this unjust measure in their possession at the time when it was found in the actual physical possession of Baldwin in the street; that is to say, Was the then physical possession of Baldwin of this measure the possession in law of the appellants or not? For my part I am unable to come to a very satisfactory conclusion upon that question, and I almost think that my learned brothers are very nearly in the same position. One of us is rather more strongly inclined than the others to give the appellants the benefit of the doubt. This is not a case where there is any moral culpability. I think that we are justified, upon the authorities

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(it is agreed that there are none directly in point on this matter) and on principle, in saying that Baldwin, who took into his physical possession this measure for a fraudulent purpose of his own, and not to commit a fraud for his employers, did not vest in his employers the possession of it any more than he would have done if he took a fraudulent and unjust instrument made for him by some third person and for that purpose. His taking that fraudulent instrument made for him by a third person into his own physical possession would not put it into the possession of his employers, because, although in one sense he would use it for their business, that is to say, in the selling of their oil to their customers, yet he would do it for his own fraudulent purposes, and therefore could not be considered as acting within the scope of his employment; and as, in that case, he would not vest in his employers the possession of this instrument, so in taking and using it as he did in the present case he was taking it and getting it into his own physical possession and also into his own legal possession, because he was doing it for his own fraudulent purposes. By the decision in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1), followed in the House of Lords in *George Whitechurch, Ld.* v. *Cavanagh* (2), and in other cases, the extent to which an employer is liable for the frauds of his employee or servant has been now well settled; and although employers are liable for the torts of their servants in ordinary cases, and for their frauds also when committed in the supposed interests of the employers, yet they are not liable for those frauds when committed, not in the interests of the employers, but for the individual purposes of profit of the fraudulent servant. That principle is well settled in reference to the civil liability for torts; and, although it is not directly applicable to the present case, we think we are at liberty so far to apply it as to say that, as this fraudulent servant had this fraudulent measure in his own physical possession for his own fraudulent purposes as distinguished from the interests of his employers, his possession must be deemed to be his own possession, and not the possession of his employers. We wish to make it quite clear that we are not considering the case where an

(1) 18 Q. B. D. 714. (2) [1902] A. C. 117.

employee in a shop makes an instrument fraudulent and continues to use it. We are not treating the present case as in any sense a precedent which will govern any future cases of that kind that may arise. Feeling that this is a very special case, we think we are justified in coming to the conclusion that I have stated, viz., that this appeal should be allowed on the ground that it was not made out that the fraudulent instrument was in law in the possession of the appellants.

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BRAY J. I am of the same opinion.

SUTTON J. I agree.

Appeal allowed.

Solicitors for appellants: *Piesse & Sons.*
Solicitor for respondent: *E. Tanner.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

KETTLEWELL *v.* REFUGE ASSURANCE COMPANY.

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Dec. 20.

Insurance, Life—Fraud of Insurance Agent—Avoidance of Policy—Recovery back of Premiums.

By a policy of life insurance the defendants, in consideration of the payment by the plaintiff of a weekly premium, contracted to pay to the plaintiff a certain sum upon the death of a third person. After the policy had been on foot for a year the plaintiff proposed to let it lapse, whereupon the defendants' agent, with the view of inducing her to continue the payment of the premiums, falsely, and without the authority of the defendants, represented to her that if she continued paying the premiums for four more years she would be entitled to a free policy—that is to say, that, though the policy would remain in force, she would on the expiration of that period have no further premiums to pay. Relying on that representation she continued to pay the premiums for the further period of four years, but on the expiration of that period the defendants refused to give her a free policy. The plaintiff sued to recover back the premiums paid by her since the date of the false representation made:—

Held by Lord Alverstone C.J. and Sir Gorell Barnes, President (Buckley L.J. dissenting), that, the contract contained in the policy

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being under the circumstances voidable at the plaintiff's option, the fact that the defendants had during the whole of the four years been subject to a risk of having to pay the sum assured in the event of the life dropping during that period did not amount to a part performance of the contract, so as to bar the plaintiff from the exercise of her option to avoid it, and that the premiums consequently could be recovered back as money had and received to her use.

Held by Lord Alverstone C.J., that the amount of the premiums could also be recovered as damages in an action of deceit.

Held by Buckley L.J., that it could be recovered as money obtained for the defendants by the fraud of their agent.

APPEAL from the judgment of a Divisional Court (Phillimore and Bray JJ.) (1) on appeal from the Louth County Court.

The plaintiff Sarah Kettlewell, by a policy of insurance dated February 18, 1901, effected an insurance with the defendant company upon the life of James Kettlewell for the sum of 13*l.* 16*s.*, which sum the defendants thereby contracted to pay to the plaintiff upon the death of James Kettlewell in consideration of the payment by her of a weekly premium of 1*s.* during his life. The plaintiff paid the premiums for a year, but in April, 1902, finding the payments to be more than she could afford, she called on one Cowling, the defendants' district superintendent, and proposed to let the policy lapse. He advised her to keep on paying the premiums until the expiration of five years from the date of the policy, and told her that then she would be entitled to a free policy—that is to say, that she would not be required to pay any further premiums as a condition of keeping the policy on foot. A similar representation was made to her by one Baumber, another of the defendants' agents, with the view of inducing her to continue the payment of the premiums. The representations so made by the defendants' agents were untrue to their knowledge, and were made without the authority of the defendants. Relying upon those representations, the plaintiff continued to pay the premiums down to February, 1906, when she claimed to have a free policy, but the defendants refused to give it her. She then brought the action to recover back the premiums paid by her.

The evidence of the defendants' inspector was to the effect that

(1) [1907] 2 K. B. 242.

the defendants' agents were employed only for the purpose of procuring proposals for policies. Those proposals had to be submitted to the defendants' chief office. The agents had no authority themselves to make any contract for the defendants.

The county court judge entered judgment for the plaintiff for the sum of 10*l.* 8*s.*, being the amount of the premiums paid since the date of the false representations made.

On appeal the Divisional Court held that the fact of the defendants having been at risk during the four years during which the premiums were so being paid did not disentitle the plaintiff to rescind the contract of insurance, and that she could recover back the premiums as money had and received to her use. They accordingly affirmed the decision. The defendants appealed.

Manisty, K.C., and *Nield*, for the defendants. Under the circumstances of this case an action for money had and received does not lie. The plaintiff was not entitled to rescind the contract, for she had received a benefit under it, and the contract was no longer executory. The defendants, during the whole of the time that the premiums in question were being paid, were under a risk of having to pay the insurance money if the life insured had dropped. It is true that, as the life did not drop, the defendants' risk did not ripen into an obligation to pay. But the plaintiff had the benefit of being covered by the policy, and of the chance of receiving the money if the event insured against had happened; and having had that benefit she could not claim to avoid the contract, for it was not then possible to restore the parties in integrum. In the Court below Phillimore J. relied upon *Duffell* v. *Wilson*. (1) But that case is distinguishable. There the defendant, in consideration of a premium, insured the plaintiff against the risk of being drawn in the militia ballot under a certain statute before February 1, 1808, and stated in terms in the form of receipt given by him that by that date all ballotings under the Act were directed to cease. This statement turned out to be a mistake, and in fact the plaintiff was drawn for the militia subsequently to the date named. It was held that he was entitled to recover back his premium. In

(1) (1808) 1 Camp. 401.

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so holding Lord Ellenborough went upon the ground, not that the contract was voidable, but that it was void ab initio.

[SIR GORELL BARNES, PRESIDENT. When Lord Ellenborough in that case spoke of the contract being "void," did he not mean "voidable"?]

If the plaintiff's claim is to be treated as a claim for damages for false representation, the action equally fails, and for two reasons. In the first place, to found an action of deceit, the misrepresentation complained of must be a representation of a past or present existing fact. A statement as to something which will happen in the future is not enough. Here the agent made no representation of any existing fact, but merely made a promise on behalf of the company that at the end of five years they would issue a free policy. The plaintiff's remedy, if any, was not in tort for deceit, but to enforce the contract. Secondly, if the false representation is that of an agent, the plaintiff must shew that the agent was acting within the scope of his authority in making it. Here the agent was purporting to alter the terms of the original policy, according to the terms of which the assured had to continue paying the premiums during the life of James Kettlewell. But the evidence was that the agent could only submit proposals for policies, and had no authority to effect new policies.

Giveen, for the plaintiff. The contract was still executory at the time when the plaintiff discovered the fraud. It was a contract to pay a sum of money on a certain event; but the event never happened, and the money was consequently never paid. Nothing short of payment of that money would have made the contract an executed one. The fact that the defendants were under a risk of having to pay it cannot amount to part performance of the contract. For a corresponding liability exists in every case in which a contract is voidable at the election of one of the two contracting parties. Take the case of an ordinary contract for the sale of shares induced by false representation. The vendor is under a liability to deliver them while the contract stands, even though they may have gone up in value since the contract was made. But if the purchaser does not discover the fraud till after they have gone down in value, he can avoid the

contract, none the less because he had a chance of the contract turning out a profitable one. The Court below were right in holding that the premiums could be recovered as money had and received.

Manisty, K.C., in reply.

LORD ALVERSTONE C.J. We all think that the judgment appealed from is right, but I am not sure that we are agreed as to our reasons. In this case the plaintiff in February, 1901, effected a policy with the defendants under circumstances to which no exception could be taken, and for rather more than twelve months she continued to pay the premiums. In April, 1902, she was about to drop the policy, when a representation was made to her by one of the defendants' agents that if she went on paying for a certain time she would get a free policy, and a similar representation was made to her later by another of the defendants' agents. Those representations were untrue, and, relying upon them, the plaintiff was induced to continue payment of the premiums. Under those circumstances she claims to be entitled to recover back the premiums paid since April, 1902. Now, as a general rule, it is clear that where money is paid in reliance upon a fraudulent misrepresentation it can be recovered back. But it is said that that does not apply to policies of life insurance, because, inasmuch as the insurance company would not be allowed in an action on the policy to set up their own agents' wrong and allege that the policy was void, they must have been under a contingent liability to pay the sum assured during the whole time that the premiums were being paid and the policy was in existence, and that consequently, as they had been at risk during the whole of that time, the contract was no longer executory, and it was too late for the defrauded party to rescind. With that contention I cannot agree. In my opinion it is not right to speak of a mere risk of that kind, which has not produced any benefit in fact to the assured, as being a part performance of the contract. I agree in the view that that is a state of things which arises in every case in which a contract is voidable, the one party being bound and the other not. I think this case is governed by the decision of the Court of Appeal in *British*

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Lord Alverstone C.J.

Workman's and General Assurance Co. v. *Cunliffe*. (1) It is quite true that in that case the objection to the policy, namely, that the assured had no insurable interest, was one which made the policy void, and not merely voidable. But I think the principle of the judgment would equally apply to a case in which the fraudulent representation made the contract voidable only, because the assured would, in that case, be equally entitled to say that she would never have entered into the contract if she had known the truth. I am of opinion, therefore, that the plaintiff may recover back the premiums paid by her as money had and received to her use. I desire to add that the money can, in my judgment, be also recovered back as damages in an action of deceit, the measure of the damages in such an action being the amount of the premiums paid. It was contended, indeed, by Mr. Manisty that an action of deceit would not lie under the circumstances of the case. In the first place, he said that the agent, in making the representation, was acting outside the scope of his authority. But there are a number of cases which shew that, if the agent is there to do the business for the benefit of the principal, the principal is responsible for representations made by the agent in the course of the business. Then it was said that the representation was not one as to an existing fact, but a mere promise as to what would be done in futuro. But it seems to me that it was a statement as to the course of the company's business, according to which the payment of five years' premiums was followed by a free policy. That is a statement of an existing practice, and therefore a representation as to a present existing fact. On both these grounds I think the plaintiff is entitled to recover back the premiums paid.

Sir Gorell Barnes, President. I am of the same opinion. I have nothing to add to what my Lord has said on the question of the agent's authority.

With regard to the other point, the way in which I regard the case is this. The policy was continuously binding on the defendants while it existed; they were liable as long as the assured

(1) (1902) 18 Times L. R. 502.

went on paying the premiums. But the assured had an option; she might, if she chose, cease to pay the premiums, whereupon by the terms of the policy the policy would come to an end. Or she might from time to time renew it by paying the premiums. Now the policy having been taken out, nothing of importance happened until after the policy had been on foot for a year. But shortly after the expiry of the year a representation was made to her, as a result of which representation she was induced to abandon her intention of letting the policy lapse, and continued to pay the premiums and thereby keep the policy alive. Some time afterwards the representation was discovered to be false. And the question is, What are her rights in respect to the premiums which she had paid in consequence of the false representation? The first point made was that the representation was not a representation as to an existing fact. But I think it is quite clear that the representation amounted to a statement that, in accordance with the course of business of the defendants, there would be a free policy forthcoming at the end of five years. It was a representation as to the existing practice of the company. Then, the fraud having been discovered, the plaintiff elected to treat the policy as void from the time when she was induced to renew it by the misrepresentation, and the only answer to her claim to do so is that she cannot effectively rescind so as to entitle her to recover the premiums which had been paid on the basis of the false representation, because during the whole of the period which elapsed between the date of the misrepresentation and the election to avoid the policy the defendants had been under a contingent liability to pay the sum assured in the event of the life dropping. I am unable to take that view. It seems to me that in all cases in which a contract is voidable at the option of one party the other party is under a liability until that option is exercised. The fact that such a liability exists will not affect the former party's right to declare the contract void. I am of opinion that the premiums which were so paid by the plaintiff can be recovered back as money had and received by the defendants to the plaintiff's use. I concur with the Lord Chief Justice in thinking that this appeal should be dismissed.

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BUCKLEY L.J. In my opinion the judgment below was right, but I do not agree with the reasons given for it. The plaintiff was induced to pay premiums from April, 1902, to February, 1906, by untrue statements made to her by the defendants' agents that at the expiration of that time she would be entitled to a free policy. The result of that was that the contract of insurance was voidable at her option, but not voidable at the defendants' option. During the time that she paid her premiums the company were at risk. If the life had dropped, and she had sued the company upon the policy, they would have had no defence. Under those circumstances it cannot lie in her mouth to say that she received nothing under the contract. Valuable consideration had passed to her in the shape of a right to sue to enforce payment of the sum assured if a certain event had happened during the four years. In my judgment, therefore, it is impossible for her to sue for the money as money had and received to her use. Phillimore J., in referring to Lord Ellenborough's ruling in *Duffell* v. *Wilson* (1), uses a word which has the result of altering the whole effect of that decision. What Lord Ellenborough said—whether rightly or wrongly does not matter for the present purpose—was that there had been misrepresentation on the part of the defendant which rendered the contract void. If it were void, of course the money could be recovered. Phillimore J., in citing that passage, substitutes the word "voidable" for the word "void," which makes the whole difference.

But there is another ground upon which I think the plaintiff can succeed. It is well established by authority that a principal cannot retain a profit made by the fraud of his agent, whether the principal authorized the fraud or not. That is the doctrine that was laid down in *Barwick* v. *English Joint Stock Bank.* (2) This general doctrine was thus expressed by Lord Coleridge C.J. in *Swift* v. *Jewsbury* (3): "Justice points out, and authority supports justice in maintaining, that where a corporation take advantage of the fraud of their agent, they cannot afterwards repudiate the agency, and say that the act which has been done

(1) 1 Camp. 401. (2) (1867) L. R. 2 Ex. 259.
(3) (1874) L. R. 9 Q. B. 301, at p. 312.

by the agent is not an act for which they are liable." The ground upon which I think the plaintiff is entitled to recover here is, that by the fraud of the defendants' agent she was induced to pay them sums of money which are now in their pockets, and are profit derived by them from the fraud. Of course, if the life had dropped and she had elected to affirm the contract, they could have retained the premiums, but then they would have had to pay her the sum assured. But the life did not drop, and on discovering the fraud she is entitled to say that they, having by their agent's fraud got her money into their pocket, cannot be allowed to keep the profit as against her.

Appeal dismissed.

Solicitors for appellants: *Horwood & Sons, for C. M. Beaumont, Manchester.*

Solicitors for respondent: *Clarkson, Greenwell & Co., for J. Barker, Great Grimsby.*

J. F. C.

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Jan. 11.

[CROWN CASE RESERVED.]

THE KING *v.* BARTHOLOMEW.

Highway—Obstruction of—Indictable Nuisance—What amounts to.

The defendant unlawfully erected and maintained in the middle of the roadway of a public street a coffee-stall. The stall was of a permanent character, having gas and water laid on to it from the mains, and being assessed to the rates at 32*l*. There was sufficient room for the passage of traffic up and down the street on either side of the stall. On an indictment of the defendant for a nuisance in thereby obstructing the highway, the jury found that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street:—

Held, that the findings did not justify the entry of a verdict of guilty.

Case stated by Jelf J. for the opinion of the Court for Crown Cases Reserved.

Arthur Bartholomew was indicted before me at Reading Assizes on October 14, 1907, for a common nuisance by placing and keeping a coffee-stall on a public carriage way and so obstructing the same. He was convicted subject to the following case:—

1. The defendant was the honorary secretary and treasurer of the Reading branch of the Church of England Temperance Society.

2. By a written agreement dated July 7, 1904, between the corporation of the borough of Reading under their common seal and the Reading branch of the Church of England Temperance Society by the defendant, their honorary secretary, the corporation purported to consent to the society placing a coffee-stall in the street within the said borough known as St. Mary's Butts, in a position to be approved by the surveyor to the corporation. The society were to pay to the corporation the sum of 1*s*. (afterwards increased to 5*l*.) on May 1 in each year during the continuance of the agreement. The society were to remove the coffee-stall on receiving notice from the corporation requiring them to do so, and in default it was to be lawful for the corporation to remove it. Nothing in the agreement was to prejudice or affect the powers of the corporation under any

existing or future public or local Act or Acts of Parliament, or any powers which were then or should thereafter be vested in them in relation to the subject-matter thereof.

3. It was not contended on the part of the defendant that the corporation had any legal power to make such an agreement as aforesaid, or to authorize any such obstruction or any public nuisance in any of the streets of Reading.

4. Under this so-called agreement the coffee-stall in question was erected by the society and the defendant, in 1904, nearly in the middle of St. Mary's Butts, which had been for many years, and still was and is, one of the main public streets of Reading, and has been maintained by them there as a permanent structure day and night ever since.

5. The coffee-stall stands in a space between a public convenience and a fountain. Its dimensions when closed are eleven feet long by 5 ft. 6 in. wide.

6. It has four small wheels, which are chained together, three of them being partly imbedded in the roadway, and one is fixed to a wooden block driven into the roadway. A supply of gas and water is laid on to it from the roadway. It is assessed to the rates at 32*l.* a year, and the defendant has paid the rates as they became due. The structure, when open, by means of flaps extends towards the pavement on each side of the street, and also towards the public convenience, three feet beyond its dimensions when closed. Annexed to the case was a plan which shewed that the fountain, the coffee-stall, and the public convenience all stood in one straight line running down the middle of the street about half-way between the two pavements. The width of the road at the point where the coffee-stall stood was sixty-six feet.

7. There was evidence that memorials against and for the continuance of the said structure had from time to time been presented to the council, those against it being chiefly, if not entirely, by rival coffee-house keepers. There had been divisions in the council in regard to it, but no step had been taken to remove it.

8. Witnesses for the prosecution testified that the coffee-stall created an obstruction to the street; that vehicles had to deviate from their course and be drawn round it, other vehicles being

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consequently kept standing in the street, sometimes eight or nine at a time; that as a daily occurrence a block was caused and inconvenience to individuals. Moreover, the part of the highway covered by the coffee-stall itself could not be used at all by the public to pass and repass.

9. Witnesses for the defence, on the contrary, including the chief constable of the borough and the chairman of the highways committee of the corporation, gave evidence that the coffee-stall created no appreciable obstruction to the traffic; that there had been no complaints by the public; and that there was plenty of room for vehicles to pass on either side of the alleged obstruction.

10. I was of opinion, on principle and on the authority of *Reg.* v. *United Kingdom Electric Telegraph Co.* (1), that the coffee-stall was ipso facto an obstruction and a public nuisance; that any member of the public might complain of it; and that it was no answer to say that enough room for traffic was left.

11. But, among others, the case of *Reg.* v. *Lepine* (2) was relied on on behalf of the defendant, and although I thought the facts of that case were imperfectly reported, and that, notwithstanding the apparent magnitude of the obstruction there treated as inappreciable, the decision could only be supported by inferring the space occupied to be a strip of infinitesimal width spread along the side of the road, and, applying the principle "De minimis non curat lex" (which could not be applied to the space occupied here by the coffee-stall in the middle of a public street), I considered it safer to take the opinion of the jury.

12. The jury returned a special verdict, finding that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street.

13. I therefore directed a verdict of guilty to be entered, and ordered the defendant to pay a fine of 1*s.* and to remove the obstruction within three months.

The question is whether my direction was right or wrong.

Arthur Powell, K.C., and *Hon. R. Coventry*, for the defendant. Upon the findings of the jury the judge ought to have directed a

(1) (1862) 31 L. J. (M.C.) 166. (2) (1866) 15 L. T. 158.

verdict of not guilty. The right of the public in respect of a highway is one of passage only, and, unless there is an appreciable interference with that right of passage, a physical obstruction upon the highway, however permanent it may be, cannot amount to a nuisance. In *Reg.* v. *Lepine* (1) the jury found that a portion of the site of a chapel and of certain land enclosed by iron railings mentioned in the indictment, to the extent in the whole of 187 square feet, was part of the parish highway, but that the obstruction to the public was inappreciable. Upon that finding the Court upheld a verdict of not guilty. Cockburn C.J. said: "It is certainly for the jury to say whether there has been any appreciable obstruction to the public in their use of the highway." The question is not whether there was an obstruction of the highway itself, but whether there was an obstruction of the public's use of it. In *Reg.* v. *Russell* (2), where the defendant, having built a sea-wall or embankment in tidal water below low-water mark, was indicted for a nuisance to the navigation, the jury said they considered this embankment, although a nuisance, was not sufficient to render the defendant criminally liable, and the judge directed an acquittal. On an application for a new trial the Court supported the verdict upon the ground that the findings amounted to a statement that the stoppage in the water was so minute as not to be a practical obstruction or to appreciably disturb the navigation. In *Reg.* v. *Betts* (3) the defendants were indicted for building a bridge the piers of which partly rested upon the bed of a public navigable river. The jury having found that the bridge was nevertheless not an obstruction to the navigation, the Court made absolute a rule to enter a verdict for the defendants. Lord Campbell C.J. said: "The true question is whether a damage accrues to the navigation in the particular locality; and that is a question for a jury. An indictment would not lie merely for erecting piers in a navigable river; it must be laid ad commune nocumentum." In *Reg.* v. *Mathias* (4) Byles J. defined a nuisance to a highway to be "that which prevents the convenient use of the way by passengers." In *Reg.* v. *United*

(1) 15 L. T. 158.
(2) (1854) 3 E. & B. 942.
(3) (1850) 16 Q. B. 1022.
(4) (1861) 2 F. & F. 570.

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Kingdom Electric Telegraph Co. (1) Crompton J., delivering the judgment of the Court, approved the ruling of Martin B. at the trial "that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law." He there expressly points out that it is not every permanent obstruction that is a nuisance, but only such as render the way less commodious. Here the jury have in effect found that the obstruction erected by the defendant did not render the street less commodious to the public. [They also referred to *Rex* v. *Ward.* (2)]

Acland, K.C., and *A. J. David*, for the Crown. The jury here have found that the coffee-stall was an obstruction. Having regard to the nature of the obstruction, namely, that it necessarily excluded the public from their right to pass over the portion of the soil of the highway that was occupied by the offending stall, the obstruction was ipso facto a nuisance. The case of *Reg.* v. *Lepine* (3) is no authority to the contrary. There the finding of the jury, as interpreted by the Court, amounted to a finding that there was practically no obstruction at all. It is true that that finding was directly against the undisputed evidence, the obstruction having been in fact most substantial, 187 square feet having been abstracted from the highway; but the question arose on a motion for a new trial, and all that the Court decided was that they could not grant a new trial upon an indictment upon the ground of the verdict being against the weight of the evidence, where the finding had been for the defendant. If a jury perversely choose to acquit a defendant on a criminal charge in the teeth of the evidence, there is no means of upsetting their verdict. But here the finding of the jury did not in any way negative the existence of a substantial obstruction; it merely found that, notwithstanding the obstruction, there was sufficient room left for the traffic to pass up and down the street. But that latter finding is absolutely irrelevant, for it loses sight of the fact that the right of the public is an absolute right to pass along and across each and every part of the highway,

(1) 31 L. J. (M.C.) 166. (2) (1836) 4 A. & E. 384.
(3) 15 L. T. 158.

including the site of the coffee-stall itself. This view of the law is supported by what is said in Hawkins' Pleas of the Crown, 8th ed. bk. 1, ch. 32, sub tit., "What shall be said to be a nuisance to the highway." Sect. 10: "There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law." What he means by "less commodious" he explains in the following section. Sect. 11: "Also it seemeth to be clear that it is no excuse for one who layeth such logs in the highway that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs." The cases of *Reg.* v. *Russell* (1) and *Reg.* v. *Betts* (2), assuming that no valid distinction can be drawn between a highway on water and a highway on land, may be explained upon the ground that there the obstruction, which was on the extreme edge of the highway, was so slight as to amount to no obstruction at all, in which case the maxim "De minimis non curat lex" would apply; whereas here the obstruction is undeniably substantial, having regard to the area occupied by it and the fact that it is in the middle of the road. The question in the present case is practically concluded in favour of the Crown by the case of *Reg.* v. *United Kingdom Electric Telegraph Co.* (3) There the defendants were convicted of a nuisance in erecting telegraph posts upon the waste strips of grass by the side of a country road between the metalled roadway and the hedge. Martin B. at the trial directed the jury (1.) that prima facie the public are entitled to a right of passage over the entire space between the hedges, and that therefore, in the absence of evidence to the contrary, the posts were on the highway; and (2.) "that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law . . . . and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon

(1) 3 E. & B. 942. (2) 16 Q. B. 1022.
(3) 31 L. J. (M.C.) 166.

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a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict." The Court, Crompton and Blackburn JJ., in a considered judgment, held the direction proper. It is perfectly clear from that direction that, in order to constitute an obstruction a nuisance, it is not necessary that it should make the highway less commodious as a whole, but that it is enough if the public are permanently excluded from their right of passage over the few square inches that are occupied by a telegraph post, even though its site be on a rarely used portion of the way. In that sense the portion of the street that was occupied by the coffee-stall in the present case was obviously rendered less commodious to members of the public who wanted to cross at that point from one side of the street to the other. The fact that the portion of the highway on which the obstruction occurs is but little used, and that the obstruction therefore causes but little public inconvenience, does not affect the liability to indictment. "The measure of inconvenience caused by an obstruction can be considered only as to the punishment of the person causing it": per Lush J., *Reg.* v. *Burney*. (1)

Arthur Powell, K.C., in reply.

LORD ALVERSTONE C.J. This case comes before us in an unsatisfactory way, and in a form which will prevent us from laying down any ruling which will be of any service in any subsequent case. The findings of the jury were such that another question ought to have been asked of them; but in a case of this kind it would be absurd to grant a new trial. In my judgment the findings as they stand are not sufficient to justify the judge in entering a verdict of guilty. The findings were "that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street." In my opinion, if I may say so with very great respect, when the jury's answer was returned they ought to have been asked what they meant by it—whether, that is to say, they meant that, although

(1) (1875) 31 L. T. 828.

there was an obstruction, so few people wanted to use the street that it did not matter, or that, situated as it was, it was no appreciable obstruction. One must not overlook the position which the coffee-stall occupied in the street. It was situate immediately between the fountain and the public convenience. The indictment was in the common form which has been in use for many years, and charged that by reason of the defendant's act "the liege subjects of our said Lord the King could not . . . . go return pass and repass . . . . in through and along the King's common highway aforesaid as they did and were wont and accustomed to do." The finding of the jury, unexplained, seems to me to be open to the construction suggested by the defendant's counsel that it amounted to a finding that there was no appreciable obstruction to any person who desired to go along or across the street. If that be the real meaning, it would not be proper for the judge to enter a verdict of guilty. I say that, because we have in support of that view the authority of Lord Denman in *Rex* v. *Ward* (1), where the jury having found "that an impediment had been created," he "declined to receive that expression as not necessarily equivalent to the word 'nuisance,' which might be too trifling in degree to be properly so called." We have also the authority of Byles J. in *Reg.* v. *Mathias* (2) that a nuisance to a highway is something "which prevents the convenient use of the way by passengers." With regard to *Reg.* v. *Lepine* (3), the finding there was treated by the Court of Queen's Bench as amounting to a finding that there was no appreciable obstruction, and I agree with Jelf J. that it is only upon that ground that that case can be supported. The case of *Reg.* v. *United Kingdom Electric Telegraph Co.* (4) is, in my opinion, not an authority in Mr. Acland's favour, because there Martin B. directed the jury that an obstruction is a nuisance only if it "renders the way less commodious than before to the public." And the very same phrase, "which will render it less commodious to the King's people," is used in the passage from Hawkins' Pleas of the Crown on which Mr. Acland relied. And the statement which Hawkins there makes, as to its being no excuse for laying logs

(1) 4 A. & E. 384, at p. 387.
(2) 2 F. & F. 570.
(3) 15 L. T. 158.
(4) 31 L. J. (M.C.) 166.

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on a highway that by windings and turnings through the logs people might pass along the way, is intended as an illustration of what would constitute an obviously "less commodious" way. I desire to add that if it is suggested that the jury's finding, that the obstruction did not appreciably interfere with "the traffic in the street," did not refer to people going across as well as along the street, it is plain that that matter ought to have been made clear by a further question. In the absence of any such question, we must read the words "the traffic in the street" as including persons desiring to pass across the street, because it is plain from the position of the stall that traffic passing along the street could rarely if ever require to pass over the site occupied by it, there being a wide space on both sides of the street up and down which the traffic could go. As, then, the finding did not amount to a finding of nuisance, it would not be proper to allow the verdict of guilty to stand, and I think the case is one in which there ought certainly not to be any further proceedings. The conviction must be quashed.

LAWRANCE J. I agree.

RIDLEY J. I agree.

DARLING J. I also agree. I think the effect of the cases which have been cited is that it is an indictable nuisance to obstruct, not the road itself, but only the use of it as a highway by such persons and vehicles as may require to pass along and over it. These are in the finding in question compendiously described as "the traffic in the street." The coffee-stall is found to be an obstruction, but one which does not obstruct this traffic. It was an obstruction which did not obstruct the only thing the obstruction of which would in law amount to a nuisance. Therefore it is found not to be a nuisance at all, and that was the gist of the indictment.

CHANNELL J. I agree, on the ground that the finding of the jury was a very ambiguous one. If understood in one way, it would justify a verdict of guilty, but if understood in another, it would not justify such a verdict. We do not know which the

jury, in fact, meant. I think, therefore, that it is insufficient to justify the entry of a verdict of guilty.

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Conviction quashed.

Solicitors for defendant: *Rawle, Johnstone & Co., for Blandy & Chambers, Reading.*

Solicitors for Crown: *Rooke & Son, for Brain & Brain, Reading.*

J. F. C.

WILSON'S MUSIC AND GENERAL PRINTING COMPANY *v.* FINSBURY BOROUGH COUNCIL.

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Dec. 6, 7, 20.

Metropolis—Drain or Sewer—Nuisance—"Intimation" Notice—Service on Person not Liable—Compulsion—Recovery of Expense of abating Nuisance.

A nuisance having arisen from the obstruction of a pipe which carried off the drainage from the plaintiffs' premises, the defendants' sanitary inspector served on the plaintiffs an "intimation" notice under the Public Health (London) Act, 1891, requiring them to abate the nuisance. The plaintiffs contended, and it was the fact, that the pipe was a sewer, and therefore repairable, not by them, but by the defendants; but the plaintiffs did the work necessary to abate the nuisance under protest, and sued the defendants to recover the expense incurred by them in so doing as money paid by them under compulsion which the defendants were compellable to pay:—

Held, that the plaintiffs were entitled to recover.

Oliver v. *Camberwell Borough Council*, (1904) 68 J. P. 165, distinguished.

ACTION tried by Channell J. without a jury.

The facts, so far as material to this report, as found by the learned judge, were as follows:—The plaintiffs were the owners and occupiers of certain premises known as No. 67B, Turnmill Street, Finsbury, which with two other sets of premises formed one block of buildings. One pipe drained all three sets of premises, and the learned judge found as a fact on the evidence (1) that the pipe was, when originally constructed, a drain for draining a block of buildings by a combined operation under an order of a vestry within s. 250 of the Metropolis

(1) See *Geen* v. *Newington Vestry*, [1898] 2 Q. B. 1.

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Management Act, 1855 (18 & 19 Vict. c. 120). This pipe passed along a private road, and eventually entered at right angles the main sewer in Turnmill Street.

In 1905 a part of the pipe under the private road was out of repair, and an obstruction occurred which caused sewage and water to enter the plaintiffs' premises. The plaintiffs contended that the liability to repair the defective pipe was on the defendants; the defendants said that the plaintiffs were liable, and on July 13, 1905, the defendants' sanitary inspector caused the following "intimation" notice to be served on the plaintiffs:—

"Metropolitan Borough of Finsbury.

"Public Health (London) Act, 1891, Metropolis Local Management and Factory Acts.

"Intimation. To the occupiers of No. 67B, Turnmill Street, E.C. I the undersigned, being one of the sanitary inspectors to the sanitary authority of the above borough, hereby inform you of the existence of a nuisance liable to be dealt with summarily under these Acts, at the above-mentioned premises, situated and being within the district of the said authority, the said nuisance being of the nature described in par. No. 53 in the schedule at the back hereof. This written intimation is given you as being the person by whose act, default, or sufferance the nuisance arises or continues, or as being the owner or occupier of the premises on which the nuisance exists, and as being the person who may be required to abate the same. If the nuisance is not abated within seven days it will be my duty to report the conditions to the sanitary authority, and proceedings will be commenced against you by the service of a statutory notice.

"(Signed) George Peverett, Sanitary Inspector."

On September 6, 1905, a second "intimation" notice in similar terms was served on the plaintiffs requiring them to abate the nuisance forthwith.

The plaintiffs thereupon caused the ground to be opened, and it was then ascertained that a pipe which carried off the surface water from a public court called Broad Court, had been connected with the pipe which drained the plaintiffs' premises at a point between the plaintiffs' premises and the place at which

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the pipe was out of repair. On September 7, and again on September 11, the plaintiffs gave written notice to the defendants that they considered that the defective pipe was a sewer for the repair of which the defendants were responsible, and that the plaintiffs would hold the defendants responsible for the cost of executing the work necessary to abate the nuisance.

There was no evidence to shew when or by whom the connection of the surface water drain pipe with the other pipe had been made.

The plaintiffs completed the necessary work of repairing the defective pipe, and in this action sought to recover from the defendants the expense incurred by them in so doing, and also damages for the injury caused to their premises and stock in trade by the existence of the nuisance.

Macmorran, K.C., and *Courthope-Munroe*, for the defendants. There is no evidence that the connection of the pipe carrying the surface water from Broad Court into the pipe draining the plaintiffs' premises was made under any order of the defendants or their predecessors, the vestry, and the inference must therefore be drawn that the connection was wrongfully made either by the plaintiffs or their predecessors in title, and the plaintiffs cannot therefore allege, as against the defendants, that the pipe is a sewer: *Heaver* v. *Fulham Borough Council.* (1) In any event the plaintiffs cannot recover the cost of doing the work of repair, for the money was paid voluntarily. An "intimation" notice is not compulsion: *Oliver* v. *Camberwell Borough Council.* (2) With regard to the claim for damages, the defendants are only liable if they were guilty of negligence: *Hammond* v. *St. Pancras Vestry* (3); there was no negligence on the part of the defendants in failing to repair the pipe—first, because they did not know that it was a sewer; and, secondly, at the time the alleged damage was caused to the plaintiffs the defendants had had no notice that the pipe was out of repair.

Danckwerts, K.C., and *Penry Oliver*, for the plaintiffs. Prima facie the effect of the connection of the two pipes was to convert

(1) [1904] 2 K. B. 383. (2) 68 J. P. 165.
(3) (1874) L. R. 9 C. P. 316.

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the pipe draining the plaintiffs' premises into a sewer from the point of junction within the definition contained in s. 250 of the Metropolis Management Act, 1855, and, being a sewer, the duty was on the defendants to keep it in repair: *Bethnal Green Vestry* v. *London School Board.* (1) The onus is on the defendants to shew that the connection was made wrongfully or in such circumstances that the plaintiffs are estopped from alleging, as against the defendants, that the pipe has become a sewer. The defendants have not discharged that onus, and they are therefore liable to the plaintiffs for damages for their failure to keep the pipe in repair: *Baron* v. *Portslade Urban Council.* (2) If it is necessary for the plaintiffs to prove negligence, there is ample evidence of negligence here, for the defendants ought to have known that the pipe was a sewer, and they knew that there were complaints that the pipe was blocked. The defendants are also liable to repay to the plaintiffs the sum expended by the plaintiffs in doing the work of repair, for the money expended was a payment which the plaintiffs were compelled by the defendants to make in respect of a matter for which the defendants were really liable. The "intimation" notice, coupled with the fact that the plaintiffs did the work under protest, constitutes a compulsion: *Haedicke* v. *Friern Barnet Urban District Council.* (3) [They also referred to *Brown* v. *Sargent* (4); *Wilkinson* v. *Llandaff and Dinas Powis Rural Council* (5); *Dent* v. *Bournemouth Corporation.* (6)]

Cur. adv. vult.

1907. Dec. 20. CHANNELL J., after stating the facts substantially as set out above, continued:—The first question which I have to consider is whether the pipe which drains the plaintiffs' premises has been converted into a sewer by reason of the connection with it of the drain carrying the surface water from Broad Court. That drain was clearly not within the scope of the combined drainage system, and, therefore, the authorities decide that, inasmuch as the pipe in question receives

(1) [1898] A. C. 190.
(2) [1900] 2 Q. B. 588.
(3) [1904] 2 K. B. 807.
(4) (1858) 1 F. & F. 112.
(5) [1903] 2 Ch. 695.
(6) (1897) 66 L. J. (Q.B.) 395.

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drainage from more buildings than were covered by the combined drainage scheme sanctioned by the vestry, it becomes a sewer from the point of junction, and the defendants are liable to keep it in repair unless they can shew that the connection of the surface water drain with the pipe in question was made in such circumstances as to prevent the defendants from being liable for its repair. It was decided by me in *Heaver* v. *Fulham Borough Council* (1), and also by Cozens-Hardy J. in *Hedley* v. *Webb* (2), that if the local authority can shew that the connection was made wrongfully by the person who is seeking to put the liability for repair on the local authority, or by a person claiming through him (otherwise than a purchaser for value without notice), then the pipe is not to be deemed to be a sewer as between the local authority and that person, and the local authority are not liable for its repair. I think that some day the authorities will go further, and that it will probably be held that a pipe is not a sewer as between the person seeking to make the local authority liable and the local authority, if that person in fact claims through the wrong-doer, although he may be a purchaser for value without notice.

There is considerable obscurity as to how or when this connection between the surface water drain and the other pipe was made; but I think that the onus is on the defendants to shew that it was wrongfully done by some one whose act estops the plaintiffs from saying, as against the defendants, that the pipe is now a sewer, and in my opinion the defendants have not discharged that onus. I must therefore hold that the obligation to repair the pipe was on the defendants. What are the consequences? It has been arranged that I have not to deal with the amount of the damage, but only with heads of damage. With regard to the presence of sewage and water on the plaintiffs' premises, the defendants say that they are, in any event, only liable for negligence, and that there was no negligence in their being ignorant that the pipe was a sewer or that there was an obstruction in it. The facts as to this are very similar to those of *Hammond* v. *St. Pancras Vestry* (3)

(1) [1904] 2 K. B. 383. (2) [1901] 2 Ch. 126.
(3) L. R. 9 C. P. 316.

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That case was tried by a jury, who found that the local authority did not in fact know that the pipe was a sewer, but that they might have known it; and in the present case I ought to find that though the defendants did not in fact know, yet they ought to have known, where the drainage of the surface water from Broad Court went to. Another point taken in *Hammond* v. *St. Pancras Vestry* (1) was that, as the obstruction in the pipe was on the plaintiffs' private property, the defendants could not be aware of the existence of the obstruction until the plaintiffs informed them of it. In the present case the existence of the obstruction, which occurred partly outside the plaintiffs' premises, only became known in consequence of what took place inside their premises; and I hold, therefore, following *Hammond* v. *St. Pancras Vestry* (1), that the plaintiffs are entitled to recover such damages as they suffered in consequence of the pipe not having been promptly cleansed at the time when the defendants first had notice of the obstruction. The greater part of the damages claimed is the cost of doing the work of repairing the defective pipe and abating the nuisance.

The defendants took up the position that the plaintiffs and the other owners of the premises were the persons who were liable to do the work, and they served on the plaintiffs two "intimation" notices under the Public Health (London) Act, 1891. Eventually the work was begun by the plaintiffs. Whilst the work was in progress the fact that the pipe received the public drainage from Broad Court was for the first time discovered. The defendants still persisted in their contention that the plaintiffs were liable, and the plaintiffs wrote two letters, dated September 7 and 11, in which they said that they would do the work under protest, but that they would claim the cost of doing so from the defendants.

The question is whether the plaintiffs did the work voluntarily or in such circumstances that they can recover the cost from the defendants. Apart from authority, I have no doubt that the plaintiffs are entitled to recover. In my opinion the case comes clearly within the class of cases in which the law implies a

(1) L. R. 9 C. P. 316.

promise to pay. That is a well-recognized principle, and seems to me to apply clearly to cases of this sort, where a local authority, being liable to do certain work, say in effect to a private person that he must do it, meaning, because the private person is legally liable to do it. The local authority do not make any express promise to pay for the work if it should turn out that they were wrong in putting the liability on the private person, but the law says that, as in these circumstances the local authority are putting pressure on the individual, a promise will be implied on the part of the local authority to reimburse the private person the cost he has incurred in doing the work for which the local authority were really legally liable.

This question was considered by myself in *North* v. *Walthamstow Urban District Council* (1), and by the Divisional Court in *Oliver* v. *Camberwell Borough Council* (2), where the Court, while agreeing with the view that I had expressed in the former case, thought that they were bound by *Thompson* v. *Hawes* (3), where the Court of Appeal had held that these intimation notices were not compulsory, but were a mere preliminary notice of intention; and therefore the Divisional Court, reluctantly I think, held that the plaintiff in *Oliver* v. *Camberwell Borough Council* (2) could not recover. I think that there is an obvious distinction between *Thompson* v. *Hawes* (3) and *Oliver* v. *Camberwell Borough Council* (2) and other cases of that class. In *Thompson* v. *Hawes* (3) a landlord was suing a tenant under a contract of tenancy, and he had, of course, to shew a real compulsion on himself to pay the money, not a mere threat, and as between landlord and tenant it was quite right to hold, as it was held in *Thompson* v. *Hawes* (3), that an intimation notice was not a real compulsion: but that decision does not really touch the point which arose in *North's Case* (1) and *Oliver's Case* (2), where if there had been a real compulsion, as distinct from a mere threat, the plaintiff would have been out of Court; for if the plaintiff could have been compelled by an order of a Court to do the work or to pay for the cost of its being done, and had

(1) (1898) 67 L. J. (Q.B.) 972. (2) 68 J. P. 165.
(3) (1895) 59 J. P. 580.

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in fact been so compelled, it is clear that he could not recover it back from the local authority: see *Marriot* v. *Hampton* (1); and consequently in these cases, where one is dealing with compulsion by means of threats put upon a person who is not liable by a local authority who are liable, if that compulsion has gone the length of being complete legal compulsion under legal process, the money cannot be recovered back. It is only when the compulsion has not gone beyond a threat of legal proceedings that the money can be recovered back on an implied promise to repay. However, even if I am right in thinking that *Oliver's Case* (2) was decided under a mistaken view as to the effect of the case in the Court of Appeal, it would still be binding on me in this case, if the facts of the two cases were the same; but in the present case there was not only an "intimation" notice, there was something more—there was an express statement made by the plaintiffs to the defendants that they only did the work under protest. The case is, therefore, very similar to *Haedicke* v. *Friern Barnet Urban District Council* (3), a decision of my own, where, when my judgment on another point was overruled by the Court of Appeal (4), it became unnecessary to consider that part of the case in which I held that, the work having been done under protest, as here, the plaintiff could recover. Therefore, even if there may be some doubt as to the position of a person who, after being served with an "intimation" notice, does the work without protest, I am clearly of opinion that if the person does it under protest, informing the local authority that he will hold them responsible for the cost of the work if it should turn out that the local authority are really liable, the position is different, and the person can recover back the money which he has spent in doing the work. For these reasons I give judgment for the plaintiffs. The amount which they are entitled to recover will include damages for the inconvenience suffered by them in their premises through the delay of the defendants in doing the necessary repairs after they had received notice that the pipe was blocked, and will also include

(1) (1797) 7 T. R. 269; 2 Sm. L. C. 11th ed. p. 421.
(2) 68 J. P. 165.
(3) [1904] 2 K. B. 807.
(4) [1905] 1 K. B. 110.

the expenditure which the plaintiffs incurred in doing the necessary work of repair to the pipe.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Holder & Wood.*
Solicitors for defendants: *W. T. Ricketts & Son.*

F. O. R.

In re AN ARBITRATION BETWEEN LUCAS AND THE CHESTERFIELD GAS AND WATER BOARD.

Waterworks — Land Compulsorily taken — Compensation — Special Value — Obtainable by Compulsory Powers.

Where land is compulsorily taken for the purpose of making a reservoir, and the land has a natural and peculiar adaptability for the construction of a reservoir, the tribunal assessing the compensation is not precluded from taking into consideration the natural adaptability of the land by reason of the fact that the land could not be utilized for the construction of a reservoir unless parliamentary powers for the compulsory purchase of other land were first obtained.

AWARD in an arbitration stated in the form of a special case.

The Chesterfield Gas and Water Board, in pursuance of the Chesterfield Gas and Water Board Act, 1904, and of the Lands Clauses Consolidation Act, 1845, served on Bernard Lucas (hereinafter referred to as the claimant) a notice to treat in respect of certain lands which the board required and were authorized to purchase under their Act of 1904.

The claimant gave notice that he desired that the amount to be paid him in respect of his claim as owner of the lands should be settled by arbitration, and each party duly appointed an arbitrator. The arbitrators appointed an umpire, and, the arbitrators having failed to agree, the umpire made his award in the form of a special case, of which the material parts were as follows:—

8. By an Act passed in 1826 the Chesterfield Waterworks and Gas Light Company was incorporated for the purpose of supplying water and gas within the limits prescribed by the said Act,

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and the company acquired the right to take water from the Linacre Brook (in the said Act called the Holme Brook) at a point near the Old Mill Pumping Station, which is a considerable distance below the lowest of the reservoirs hereinafter mentioned.

9. By the Chesterfield Waterworks and Gas Light Company's Act, 1855, the Act of 1826 was repealed, and the company thereby incorporated was dissolved, and in lieu thereof a new company was incorporated under the same name for the purpose (inter alia) of supplying with water the town and borough of Chesterfield, the parish of Brampton, and certain townships in the parish of Chesterfield, or some parts thereof, and the effects of the dissolved company were vested in the new company.

10. By s. 21 of the Act of 1855 the company was authorized (inter alia) to construct a reservoir upon a stream called Linacre Brook or Holme Brook, in Linacre Wood, the property of the Duke of Devonshire, and for that purpose to impound the waters of the Holme or Linacre Brook as shewn on the deposited plans, and to use so much of the said waters as might be necessary for the supply of the inhabitants within the limits defined by the Act. The reservoir was duly constructed by the company, and is hereinafter referred to as the Lower Linacre Reservoir.

11. By the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865, the company was authorized to construct a reservoir upon the Linacre Brook, the embankment of which would be about fifty-three chains westward of and above the Lower Linacre Reservoir.

12. The company duly constructed the said reservoir in pursuance of the powers contained in the Act of 1865. The said reservoir is hereinafter referred to as the Upper Linacre Reservoir.

13. By the Chesterfield Waterworks and Gas Light Company's Act, 1871, the company was authorized to make and maintain an aqueduct or conduit between the Upper Linacre Reservoir and an existing reservoir known as the Club Mill Service Reservoir of the company, together with such tanks, valves, sluices, and other works as should be necessary, and the company was further authorized to enter upon, take, and use such of the lands described in the deposited plans and book

of reference as it should require for the purposes of such works.

14. By an indenture dated March 9, 1875, and made between John Drabble and the company, the said John Drabble conveyed to the company certain lands for the purpose of making an embankment for the Upper Linacre Reservoir, and also other lands for the purpose of constructing a pipe line from the Upper Linacre Reservoir in accordance with the provisions of the Act of 1871, and by the said conveyance it was declared that the company had, in accordance with the conditions of the agreement for purchase, made and constructed a watering place for cattle at a point marked upon the plan on the conveyance for the use of the said John Drabble, his heirs and assigns, and his and their tenants, to the satisfaction of the said John Drabble, but such condition was not to be construed as imposing upon the company any obligation to supply water from their reservoir or otherwise, and the said John Drabble should not have a right to claim from the company any further or other supply than the natural supply from the brook there.

The said John Drabble was the predecessor in title of the claimant of the property included in the said notice to treat.

16. By the Chesterfield Gas and Water Board Act, 1895, the Chesterfield Gas and Water Board were incorporated, and were granted powers to acquire the undertaking of the company, with all its rights, powers, duties, obligations and privileges, and in pursuance of the powers contained in such Act the board have acquired the undertaking of the company.

17. By s. 40 of the said Act it was (inter alia) provided that the rural district council or other sanitary authority within the parishes where the land, the subject of this arbitration, is situated might, subject as therein mentioned, purchase certain parts of the waterworks and plant of the board, being such parts thereof as are within the parishes aforesaid (except the main pipes and other works which should be necessary for supplying with water any other part of the area for the time being included within the limits of the said board).

18. By the Chesterfield Gas and Water Board Act, 1904, the board were authorized to construct a storage reservoir, to be

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called the Middle Linacre Reservoir, between the Upper Linacre Reservoir and the Lower Linacre Reservoir, to be formed by means of an embankment or retaining wall across the Linacre Brook, and they were further authorized to divert and impound into the reservoir and works by the said Act authorized any water which they were then authorized to take; but nothing in the said Act was to authorize the board to take any water which they were not then authorized to take. In pursuance of the powers contained in this Act the board have given the notice to treat referred to in this award.

19. Having heard, examined, and considered the allegations of the parties and the documents and evidence of both parties concerning the premises, and having viewed the lands and hereditaments, the umpire came to the following conclusions:—

(*a*) The site in question has peculiar natural advantages for a reservoir site in conjunction with the land on the opposite side of the valley belonging to the Duke of Devonshire, both on account of the general natural configuration of the land and the class of the underlying stratification.

(*b*) The construction of a reservoir by the claimant and the Duke of Devonshire would be interfered with by the pipe line constructed in pursuance of the provisions contained in the indenture of March 9, 1875, and such a reservoir could not be constructed without the consent of the board unless the works of the board were acquired by the rural district council under s. 40 of the Act of 1895, and such district council were to combine with the claimant and the Duke of Devonshire in the construction of a reservoir or were to allow them to construct such reservoir.

(*c*) The claimant could not, except at prohibitive expense, construct a reservoir upon his own land.

(*d*) There is competition for the supply of water within the district in question.

(*e*) Neither the board nor their predecessors have by any Act of Parliament acquired or possess any right or powers to impound any water save and except such powers as are given to them by the Act of 1855 to impound in the Lower Linacre Reservoir so much of the waters of the Linacre Brook as may be necessary for

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the supply of the inhabitants within the limits defined by that Act.

20. Upon the above findings the umpire was of opinion that the special natural advantage of the site as a site for a reservoir was a fit and proper matter for consideration as an element in assessing the value of the lands and hereditaments to be taken, but that he ought not to make any award as compensation for water.

21. Having, therefore, taken upon himself the burden of the reference, he awarded and determined that the sum of 1615*l.* was the amount of the purchase-money and compensation for the fee simple of the lands and hereditaments included in the notice to treat, and for the damage, if any, to be sustained by the owner of the land by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such lands by the exercise of the powers of the Act of 1904 or any Act incorporated therewith.

22. The umpire further awarded and determined that the claimant was not entitled to any compensation from the board in respect of any claim for water.

24. The umpire was desirous of stating for the opinion of the Court the question as to whether in estimating the value of the lands and hereditaments to be acquired by the board the natural and peculiar adaptability of the lands in question for the construction of a reservoir was or was not a fit and proper matter for consideration by him as an element in the value thereof in the assessment of compensation, having regard to the fact that such reservoir could not be constructed without the concurrence of the board, unless the works of the board were acquired by the rural district council under s. 40 of the Act of 1895 and such district council were to combine with the claimant and the Duke of Devonshire in the construction of a reservoir or were to concur in such construction by them.

If the Court should be of opinion that in estimating the value of the said lands and hereditaments the natural and peculiar adaptability thereof for the construction of a reservoir was not a fit and proper matter for consideration as an element in the assessment, having regard to the circumstances aforesaid, the award was to be reduced by the sum of 779*l.*

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Balfour Browne, K.C., and *W. M. Acworth*, for the board. In the circumstances of this case the umpire was wrong in treating the natural and peculiar adaptability of the land for the construction of a reservoir as an element in the value of the land. The word "adaptability" is a mere catchword which has come into use in compensation cases, but it does not embody any legal principle. In all cases of compensation, everything which gives a particular value to the land in question is an element to be taken into consideration in assessing the value—for example, land near a town may have an additional value owing to its being suitable for building purposes. But in the present case the umpire has erred in thinking that the suitability of the claimant's land for the construction of a reservoir, by reason of the natural configuration of the land, was of itself a matter to be taken into consideration, apart from the question whether there was in fact any real possibility of its being used for that purpose. The fact that the concurrence of the Duke of Devonshire would be required is immaterial, but it is conceded by the other side that the umpire was wrong in thinking that the district council could, under s. 40 of the Act of 1895, acquire the works of the board. An examination of the various Acts of Parliament obtained by the board and their predecessors, and the facts stated in the award, shew that this land could have no special value as a possible site for a reservoir, and that there is no possible purchaser for that purpose except the board, and that the element of competition is therefore lacking. All the available water is already under the control of the board, and part of the land which would be required for the construction of a reservoir on the claimant's land belongs to the board, who, of course, would not consent to sell their land in order to assist in the construction of a rival reservoir. The umpire should therefore have disregarded the natural suitability of the land for a reservoir. [They referred to *In re Gough and Aspatria, Silloth and District Joint Water Board* (1); *In re Tynemouth Corporation and Duke of Northumberland.* (2)]

E. Sutton, for the claimant. It is agreed that the district council has not the powers attributed to it in par. 17 of the

(1) [1904] 1 K. B. 417. (2) (1903) 19 Times L. R. 630.

case. The claimant is entitled to the full amount of the award. Prima facie the special value of land is its market value, and it is for the promoters to prove that in the circumstances of this case there is no possibility of a buyer at the special value: see *Gough's Case* (1), per Collins M.R. It is said, first, that there is no water to be obtained for a reservoir on the claimant's land, but there is no finding in the case to that effect, and the Acts shew that the board had only a limited right to water. Secondly, it is said that the construction of a reservoir on the claimant's land would be impossible without the concurrence of the board, and that their consent would, for obvious reasons, not be given. That difficulty could, however, be got over by obtaining compulsory powers, and the fact that, in order to realize the special value, parliamentary powers are necessary is no reason for excluding the element of special value from consideration in determining the amount of compensation: *In re Countess Ossalinsky and Manchester Corporation.* (2) Further, the fact that the claimant's land was in the immediate vicinity of the board's undertaking was a matter which the umpire was entitled to take into consideration in determining the value of the land.

Balfour Browne, K.C., replied.

Cur. adv. vult.

Dec. 20. BRAY J. read the following judgment:—This is a special case stated by Mr. Wainwright, the umpire appointed under the Lands Clauses Act, 1845, to assess the amount of compensation payable to Mr. Lucas for lands which the Chesterfield Gas and Water Board had given notice to treat for and proposed to acquire, and, having in the course of the case certain points of law raised before him, he stated his award in the form of a special case. [The learned judge read pars. 19, 20, 21, 22 and 24 of the special case, and continued as follows:—] Counsel agree that the umpire was wrong in assuming that the district council could acquire the works under s. 40 of the Act of

(1) [1904] 1 K. B. at p. 423.

(2) Not reported. Decided in 1883 in the Queen's Bench Division by Grove and Stephen JJ. The judgment of the Court is set out at length in Browne and Allan, Law of Compensation, 1st ed. p. 718; 2nd ed. p. 659.

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1895, and counsel also agree that no point can be made on the ground that the Duke of Devonshire's concurrence is necessary. The question, therefore, that I have to consider is reduced to this—whether the umpire was precluded from considering what I may call the special value of Mr. Lucas's land as an element in its value by reason of the fact that the reservoir could not be constructed without the concurrence of the board, which is the same thing as saying that it could not be constructed except by some body which had obtained parliamentary powers to acquire compulsorily the land of the board lying within the area of the reservoir and to interfere with the line of pipes. Now it was laid down in *In re Gough and The Aspatria, Silloth and District Joint Water Board* (1) that it was for the promoters to shew that the special value had not a market value; prima facie it would have a market value, but it might be shewn that there were no buyers. In that case, in a very short and concise judgment, Collins L.J. says (2): "It is alleged on behalf of the water board that, taking the facts as found by the umpire in his award, it follows as a matter of law that the element of the adaptability of this site for the purposes of a reservoir ought not to be included in assessing compensation. The umpire has included it, and it seems to me that in so doing he has followed the prima facie presumption that this element of adaptability ought to find a place in the estimate of the amount of compensation. That view is supported by authority and by long practice; but underlying it is the question, which is one of fact for the arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered. To exclude the element of adaptability it would be necessary, as it seems to me, to shew that there is no reasonable possibility of the site coming into the market. The value of the possibility, if it exists, is a question entirely for the arbitrator." Now the board contend that there are and can be no buyers, because they can stop all buying of the claimed land for reservoir purposes by refusing to sell their land. They also contended that there was no water to fill the reservoirs. I will dispose of the last point first. The umpire does not state that there is no water. Nothing is stated in the

(1) [1904] 1 K. B. 417. (2) [1904] 1 K. B. at p. 423.

case to compel me to come to the conclusion that no water can be obtained; indeed, I should infer that it could, because the board are only entitled to take from the Linacre Brook sufficient to supply certain inhabitants of their district. It is a question of fact, not law, whether water can be obtained, and I must assume that the umpire has considered this point.

I come back to the question whether the fact that no buyer for reservoir purposes can be found, except a buyer who has obtained parliamentary powers, prevents the special value of the land being marketable. In my opinion the answer I ought to give to that question is "No." In *In re Countess Ossalinsky and Manchester Corporation* (1) Stephen J. stated in the report which is given in the appendix to Mr. Balfour Browne's Law of Compensation, 2nd ed. at p. 670: "But when you come to consider the value of the land you have to take, you must assume that people will act in the usual way, and no doubt whenever any reservoir is made at Thirlmere it would be made under parliamentary powers, which would be applied for by the persons who were desirous of making the reservoir, and that whether the water travelled northwards down to Keswick in that direction, or whether it travelled southward in tunnels and so on to Manchester, or wherever it was wanted to go—wherever it might be wanted to go, and under whatever circumstances Thirlmere might be turned into a reservoir, it would be absolutely necessary that the Countess Ossalinsky's land should be taken, and it seems to me it would be altogether improper to deprive her of the benefit derived from that circumstance." So here I think it would be improper to deprive Mr. Lucas of the benefit of the special adaptability of his land merely because parliamentary powers would have to be obtained, and from a practical point of view it would be almost always impossible to construct a reservoir at all without parliamentary powers, because even if all the necessary land belonged to one owner the water to fill the reservoir would probably have to be taken, as here, from a natural stream or brook, the flow of water in which cannot be interfered with without the consent of the riparian proprietors below, and without parliamentary powers one riparian owner

(1) See note (2), ante, p. 577.

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could practically stop the construction or use of the reservoir. It may be true that parliamentary powers may be difficult to obtain, but that is for the umpire to consider, not for me. Considering the fact that scarcely a reservoir in England has been constructed without parliamentary powers to acquire compulsorily land and interests in land, it seems to me that it would be wrong to say that in law the special value must be ignored because parliamentary powers are required.

There seems to me to be another reason why I should answer "No." It was argued by Mr. Sutton that the fact that the board itself might become possible purchasers, who would give a special price for the land owing to its special value, ought to be considered. I think that is so. The fact that they have obtained statutory powers must not be taken into consideration, but before any statutory powers had been given or even applied for it may well be that these lands would have a special value owing to the fact that it was likely that sooner or later the board would require another reservoir, and that this would form a most convenient site for one. It seems to me that the principles laid down in the *Ossalinsky Case* (1) support this view also. On p. 662 Grove J. says: "That would be a serious objection to the award and a fatal one, because, as far as my experience goes, it has been the invariable practice sanctioned by the Courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there —that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the

(1) See note (2), ante, p. 577.

schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument." I cannot doubt that land adjoining large works would, in fact, often have a special value, because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the board desired to build a new reservoir, this was the most convenient site on which to build it?

On these two grounds it seems to me impossible to say as a matter of law that the umpire was bound to exclude the special value of the land from his consideration. But it did occur to me that if the umpire assumed that the district council could take the board's land without further parliamentary powers he might not have given sufficient weight to the difficulty which another body might have in obtaining parliamentary powers, and I therefore proposed to counsel that I should see him and explain the difficulty and give him the opportunity of altering his figures if he wished; but though Mr. Sutton was prepared to consent to this course, Mr. Balfour Browne was not so prepared, because it might prejudice his right of appeal from my judgment, and probably he was right in this view. At all events, no application has been made to me to remit the award to the arbitrator for this or any other purpose. My duty, therefore, seems simply to answer the question put to me by the umpire, and I answer it in favour of Mr. Lucas, and the award must stand for the higher sum.

Judgment for claimant.

Solicitor for the board: *J. Middleton, Chesterfield.*

Solicitors for the claimant: *Shipton, Hallewell & Co., Chesterfield.*

F. O. R.

1908
Jan. 16.

OETTINGER *v.* COHN.

Stamp—Promissory Note—Payable at Sight—Ad Valorem Duty—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 32, 33; Sched. I.

A promissory note payable at sight is liable to an ad valorem stamp duty.

Action tried by Channell J. without a jury.

The plaintiffs claimed principal and interest due under a promissory note made by the defendants. The note was in the following terms: "We the undersigned severally and collectively promise to pay to Messrs. H. N. Oettinger & Co., or order, at sight, the sum of two hundred and fifty pounds sterling value received."

The note was stamped by the defendants with a penny stamp, and was sent by them from England in the course of business to the plaintiffs in Hamburg.

The defendants pleaded (inter alia) that the note was insufficiently stamped, and could not be sued upon.

Under the First Schedule to the Stamp Act, 1891, the stamp duty on a "bill of exchange payable on demand or at sight or on presentation" is one penny; and there is an ad valorem stamp duty on a "bill of exchange of any other kind whatsoever (except a bank note) and a promissory note of any kind whatsoever (except a bank note) drawn, or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom."

Shearman, K.C., and *Schiller*, for the plaintiffs. The document is sufficiently stamped. It is a document or writing entitling a person to payment by another person of a sum of money, and it is therefore a bill of exchange within s. 32 of the Stamp Act, 1891 (1), and, being expressed to be payable at sight, the

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 32: "For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person

stamp duty is one penny. The document is no doubt also a promissory note as defined by s. 33, but the language of the schedule to the Stamp Act, which imposes an ad valorem duty on a "promissory note of any kind whatsoever," must be read as applying only to documents which do not come within the definition of a bill of exchange in s. 32. Further, the document does not come within the language of the schedule, for it is not "expressed to be payable" in the United Kingdom, nor was it "drawn" there.

Atkin, K.C., and *Hansell*, for the defendants.

CHANNELL J. In my opinion this document requires an ad valorem stamp. The definitions in the Stamp Act have, no doubt intentionally, been drawn in very wide terms, and in the case of bills of exchange and promissory notes the definitions do overlap, with the result that the definition of a bill of exchange does include a promissory note. But in order to ascertain what stamp duty any particular instrument is liable to pay one must refer to the schedule, and one finds there that in the case of a bill of exchange payable at sight the duty is one penny, and therefore, as this document comes within the definition of a bill of exchange in s. 32, it probably requires a penny stamp. Then the next clause in the schedule imposes an ad valorem duty on bills of exchange "of any other kind whatsoever"—that is to say, on all bills of exchange except those payable on demand or at sight, and on promissory notes "of any kind whatsoever." In my opinion that clearly means all promissory notes, whether payable on demand or at sight or not. Therefore this document, which is a promissory note as defined by s. 33, is made liable to the ad valorem duty, and the document, being insufficiently

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for, any sum of money; and the expression 'bill of exchange payable on demand' includes—

"(*a*) An order for the payment of any sum of money by a bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;"

Sect. 33: "(1.) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money."

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stamped, is one on which the plaintiffs cannot recover in this action.

I think, however, that the plaintiffs ought to have leave to amend, on terms, in order to enable them to sue on the original consideration for which the promissory note was given, if they desire to do so.

Order accordingly.

Solicitors for plaintiffs: *Adler & Perowne.*

Solicitors for defendants: *Goldberg, Barratt & Newall.*

F. O. R.

1908

Jan. 24.

BOTTOMLEY *v.* BROUGHAM.

Defamation—Libel—Absolute Privilege—Report of Official Receiver under Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-s.* 2.

The absolute privilege attaching to the statements of judicial officers, advocates, and witnesses is not a privilege to be malicious, but a privilege that their statements in judicial proceedings should be exempt from any inquiry whether they were prompted by malice or not, it being for the public interest that such statements should be made without any apprehension of subsequent legal proceedings.

The report of an official receiver made to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, is absolutely privileged.

SUMMONS for an order dismissing the action as frivolous and vexatious and an abuse of the process of the Court, set down for trial by the order of a Master in chambers as raising a point of law to be argued.

The statement of claim alleged that the plaintiff was a financier and journalist, who at all material times was the managing director of a company called the Joint Stock Trust and Finance Corporation, Limited, which company was being wound up under an order of the Court of March 19, 1906. The defendant was the senior official receiver appointed under the Companies Acts.

The 2nd paragraph of the statement of claim was as follows: "On June 12, 1907, the defendant falsely and maliciously, and in breach of his duty to make full inquiries

and to weigh carefully all the information he might possess, and having in his possession information which, if examined with due care, would have shewn him that the words hereinafter complained of were false, wrote and published of the plaintiff, and of the plaintiff as managing director of the said company, in a document purporting to be a further report in the winding-up of the said company, the words hereinafter set out, which purported to be a summary of the conclusions arrived at in the said report; that is to say, 'The official receiver'" (meaning the defendant) "'is of opinion that the following matters constituted frauds in the conduct of the company's'" (meaning the said company's) "'business, to which the person named in the schedule attached hereto was a party.'"

The portion of the report set out in the statement of claim then went on to enumerate a number of transactions, and in the schedule gave the name of the defendant.

The statement of claim went on to allege that these words meant, and were understood to mean, that the plaintiff had acted fraudulently and dishonestly in relation to the affairs of the company, and it set out that by reason of the premises the plaintiff had been injured in his credit and reputation, and that the plaintiff claimed damages.

The only publication relied upon was the publication of the report in the ordinary course of the business of the defendant as official receiver.

The Solicitor-General (*Sir W. S. Robson, K.C.*) and *Rowlatt*, for the defendant. The action will not lie. The report of an official receiver to the Court is entitled to absolute privilege, and there can be no inquiry whether it was made maliciously or not. The report is made by the official receiver in pursuance of his judicial duties and under statutory authority: Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 8, sub-s. 2.

The absolute privilege of statements of judicial officers when made in their judicial capacity is well settled, and no action will lie against an advocate for words spoken in the course of a judicial investigation: *Munster* v. *Lamb*. (1) In the same way an

(1) (1883) 11 Q. B. D. 588.

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information or complaint which initiates legal proceedings has been held to be absolutely privileged: *Lilley* v. *Roney*. (1) The duty of an official receiver to make a report where in his opinion a fraud has been committed in relation to a company which is being wound up is explained in *Ex parte Barnes* (2): see also observations of Vaughan Williams J. (3)

F. E. Smith, for the plaintiff. There is no absolute privilege for this report, and the statement of claim alleges express malice. The official receiver, as liquidator of a company, is the creation of the Companies (Winding-up) Act, 1890, and is not a judicial or quasi-judicial officer whose statements are entitled to absolute privilege. He is the servant of the Board of Trade, and can be appointed and dismissed by that Board. His duties are not judicial, as he is a quasi-partisan. He is more in the position of an advocate than of a judge; his report is made ex parte, and the person against whom it is made has no opportunity of answering it. The essential element of absolute privilege is that the statement should be made, whether by a judge, an advocate, or a witness, in a Court: *Royal Aquarium* v. *Parkinson*. (4) In *In re Civil, Naval and Military Outfitters, Ld.* (5) Chitty L.J. points out that on the official receiver's report under s. 8 it is the judge who has to direct whether a public examination shall take place or not.

The report of the official receiver, therefore, is not absolutely privileged. He is quite sufficiently protected if he acts honestly and without malice in making it. The doctrine of absolute privilege ought not to be extended.

[He referred to *Stevens* v. *Sampson* (6); *Little* v. *Pomeroy*. (7)]

Rowlatt replied.

CHANNELL J. I have no doubt that this action is not maintainable.

I should first like to explain my view, which is derived from the former cases, as to the meaning of what is called "absolute

(1) (1892) 61 L. J. (Q.B.) 727.
(2) [1896] A. C. 146.
(3) [1894] W. N. March 10, p. 44.
(4) [1892] 1 Q. B. 431.
(5) [1899] 1 Ch. 215, at p. 234.
(6) (1879) 49 L. J. (Q.B.) 120.
(7) (1873) I. R. 7 C. L. 50.

privilege." I do not think that it is a very accurate expression, and I am sure that calling it a "privilege" is sometimes misleading. Privilege means, in the ordinary way, a private right. Now there is no private right of a judge, or a witness, or an advocate to be malicious. It would be wrong of him, and if it could be proved I am by no means sure that it would not be actionable. The real doctrine of what is called "absolute privilege" is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of "absolute privilege" is sometimes complained of is that it is not thoroughly understood. That explanation of the doctrine will be found here and there in many of the cases, although it never seems to have been put into the head-note, and so it does not appear prominently as the real ground of the doctrine. In *Munster* v. *Lamb* (1), for instance, the explanation of the doctrine is given in some of the judgments, but it is not to be found in the head-note; and the same remark applies to some of the cases earlier than *Munster* v. *Lamb*. (1)

Starting with that as being the doctrine, does not the case of the official receiver come clearly within it? In my opinion it comes within it on two grounds.

I think, in the first place, that the official receiver has a statutory duty to inquire in a judicial way into certain matters by the Act of 1890, and that in performing that duty he is acting in a judicial capacity. It is quite true that the report is

(1) 11 Q. B. D. 588.

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made ex parte, but that makes no difference. A judge in hearing an ex parte application is still acting as a judge, and the absolute privilege applies quite as much as when he is hearing a case in which both parties appear. The fact that this was a preliminary inquiry equally does not prevent it being a judicial inquiry. An inquiry before a magistrate on a charge of murder, for instance, which he has certainly no power to deal with, and as to which he is only inquiring in a preliminary way whether there is a case for committing the accused person for trial, is clearly a judicial proceeding although it is preliminary to the trial. It is strongly contended on the part of the plaintiff that there is mischief and danger in allowing absolute privilege in this case, because it is an ex parte statement, and the person against whom the charge is made has no opportunity of meeting it; it appears to me, however, that the answer to that is the very fact that it is preliminary, and that it does lead to further inquiry upon which that person does have that opportunity of explaining and giving his view of the matter, and that, it being obviously known by anybody who sees and reads the report of the official receiver that, qua report, it will lead to future proceedings in which the report may be entirely displaced, that really prevents any serious mischief arising from applying this doctrine to such a proceeding as this. I think, therefore, that this report may be considered to be absolutely privileged on the footing of its being the judgment of a judicial officer upon a matter entrusted to him for inquiry.

But, even if that is not sound, there is the further ground that the report of the official receiver may be treated, not so much as the judgment in a judicial proceeding, but as the initial stage of proceedings in the winding-up Court, which clearly is a Court. It is the information upon which the proceedings take place, and it is made by the official receiver under a statutory duty. It seems to me to come within the authority of the case of *Lilley* v. *Roney* (1), and to be a much stronger case, because in that case a complaint by a person who considered himself aggrieved by the conduct of a solicitor—a complaint which was the initiation of proceedings before the Law Society—was held to be privileged as being the commencement of proceedings of a legal character. I quite

(1) 61 L. J. (Q.B.) 727.

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agree that there the privilege was rather the privilege of a litigant than the privilege of a judge; it was the privilege of a man who was starting proceedings. It is perhaps not quite accurate to say the official receiver is in any sense a litigant, but when he comes before the winding-up Court upon the examination no doubt he is, in one sense, a party to the proceedings; he is, as it were, appearing for the prosecution. It is much the same as when the Attorney-General appears upon an information filed by the Attorney-General; he is then a party to the proceedings possibly, not a litigant, and I should say certainly not acting as a judge, but I do not see that that much affects the matter here. In presenting this report the official receiver is informing the Court of alleged matters for inquiry, and so initiating a judicial inquiry; and it seems to me to be entirely analogous to what was held to be absolute privilege in *Lilley* v. *Roney* (1), and to be a stronger case. It was done in the course of the performance of a duty imposed upon him in his position of officer of the Court. It is much like the report of an official referee, or some one of that sort, to whom matters are referred to report to the Court. I suppose no one would doubt that those reports were privileged.

I think there can be no real doubt upon this matter. I hold in this case that the statement of claim shews no reasonable cause of action, and therefore I make an order to strike it out.

Action dismissed.

Solicitor for plaintiff: *A. Edward Dunn.*

Solicitor for defendant: *The Solicitor, Board of Trade.*

(1) 61 L. J. (Q.B.) 727.

A. P. P. K.

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Dec. 14.

COBBETT AND OTHERS *v.* WOOD.

Solicitor—Bill of Costs—Misdescription—Bill improperly headed—Sufficiency of Bill—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

The plaintiffs had acted as solicitors for the defendant's wife in a petition for judicial separation in the High Court, and subsequently in proceedings before justices under the Summary Jurisdiction (Married Women) Act, 1895. The petition in the High Court was dismissed, but the defendant was ordered to pay the costs as between party and party, which he did. The proceedings before justices were successful, and the defendant was ordered to pay a certain fixed sum for costs, which he paid accordingly. The plaintiff, then delivered to the defendant the bill of costs on which the present action was brought, which was headed "In the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce)," and which contained not only the items of extra costs as between solicitor and client in the proceedings in that Court, but also items of costs in advising the wife as to her differences with the defendant and items of costs in respect of the proceedings before justices. The items allowed on taxation in the party and party bill of costs in the High Court were not included in the bill:—

Held, that the bill was not invalid, since in respect of the High Court costs it might be regarded as having been delivered in two parts, and in respect of the other items it gave the defendant all the information he could reasonably require, although those items were not separately headed.

Held, also, on the authority of *Cale* v. *James*, [1897] 1 Q. B. 418, that the costs in respect of the proceedings before justices could not be recovered.

ACTION tried before Pickford J. without a jury at the Liverpool Assizes.

The action was brought by a firm of solicitors against the defendant to recover the balance of costs incurred by them as solicitors for the defendant's wife.

Cyril Atkinson, for the plaintiffs.

Merriman, for the defendant.

The facts and arguments sufficiently appear from the judgment.

At the conclusion of the arguments in Liverpool the learned judge reserved judgment, which was subsequently delivered in London.

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Dec. 14. PICKFORD J. This was an action upon a solicitor's bill of costs, the costs having been incurred by the defendant's wife both in instituting proceedings for a judicial separation from her husband in the Probate, Divorce and Admiralty Division of the High Court, and also in other proceedings which she took against her husband before magistrates and in obtaining advice in regard to the matters arising out of or leading up to both of those proceedings.

In both of those proceedings the plaintiffs acted as solicitors to the defendant's wife. The petition to the Probate, Divorce and Admiralty Division was presented in 1904, and was subsequently dismissed. The defendant, however, was ordered to pay the costs as between party and party, and accordingly the plaintiffs delivered to the defendant or his solicitor a bill of costs as between party and party. That bill was taxed, and the defendant, as I understand, paid the amount found due on taxation. Subsequently the defendant's wife took proceedings against the defendant before justices under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, and the justices made a separation order under the Act and ordered the defendant to pay to his wife a sum of 2*l.* a week, and also ordered him to pay a sum of 3*l.* 3*s.* for costs. Those costs, also, the defendant paid. Subsequently the plaintiffs delivered to the defendant the bill of costs on which the present action is brought. That bill is headed: "In the High Court of Justice, Probate, Divorce, and Admiralty Division (Divorce). Your Wife *v.* Yourself. Petition for judicial separation. Costs as between solicitor and client, including costs not allowed as between party and party." The bill contains a number of items of extra costs incurred as between solicitor and client in the proceedings in the High Court for a judicial separation. Most of these items were not included in the bill of costs as between party and party, but some of the items were no doubt contained in that bill, and were disallowed as between party and party on taxation. The bill also contains a number of items for advising the wife as to the differences between herself and the defendant. Then come a number of items of costs in connection with the proceedings before the justices, and for the advice given to the defendant's wife in

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respect of those proceedings. These latter items are not headed separately from the rest of the bill, but the whole bill runs on continuously. Credit is given for cash and costs allowed; and the items allowed on taxation in the bill for party and party costs, which, as I have said, the defendant has already paid, are not included in the present bill.

Now the defence to the action is that no proper bill of costs has been delivered before action. It is contended that the bill in question is not a proper bill within the meaning of s. 37 of the Solicitors Act, 1843.

In the first place it is said that the bill is incomplete, inasmuch as the items in the bill for party and party costs, which have already been paid, are not included in the present bill, although many of the items in the present bill consist of the extra costs in that bill which were disallowed on taxation. Then it is said that many of the items in the present bill are improperly described and do not come within the heading, and that, therefore, the bill is invalid in respect of those items. Lastly it is contended that the items in respect of the costs incurred in the proceedings before the justices are not recoverable, because the justices, who alone had jurisdiction to award the costs of proceedings in their Court, have awarded a sum of 3*l.* 3*s.* for costs, which has been paid by the defendant. The contention, therefore, is that the whole of this bill is bad, and consequently that the present action cannot be maintained.

Now with regard to the first point, that the items in the party and party bill of costs should have been again included in the present bill, the defendant relies on *Waller* v. *Lacy* (1), and particularly on a passage in the judgment of Tindal C.J. (2): "An attorney's bill, generally speaking, ought to give a history of the cause, so as to enable the officer to judge of the propriety of the various items of which it is composed; but if part only of the charges are set forth he has not sufficient material whereon to form his judgment." It is argued that those words apply to this case. I think, however, that the facts in *Waller* v. *Lacy* (1) were very different to those on which I have now to decide. In that case the bill for costs as between party and party had been delivered,

(1) (1840) 1 Man. & G. 54. (2) Ibid. at p. 69.

not to the defendant in the action, but to a stranger; and, therefore, to deliver to the defendant a bill consisting simply of extra costs which had been disallowed on taxation of the party and party costs would not give him the information to which he was entitled, and which would enable him to say whether or not he objected to any of the items, since he knew nothing of the items of the party and party bill of costs. That is quite a different case from the present one, where the bill for party and party costs was presented to and paid by the defendant, and is probably in his possession still.

It does not seem to me that the principle laid down in *Waller* v. *Lacy* (1) has any application here.

There is no doubt that a solicitor may deliver a series of bills. He may deliver a bill for all the costs incurred up to December 31 in any year, and a further bill for the costs incurred after that date. If a bill can be separated chronologically, why should it not be separated in regard to its items so long as it gives the client all the information he requires?

The defendant is responsible for the costs reasonably incurred by his wife in taking proceedings for a separation and in getting advice about those proceedings. I can see no reason why I should not treat the party and party bill of costs and the extra costs set out in the present bill as one bill of costs delivered in two parts. It is the bill of costs in respect of the proceedings in the High Court which has been separated, for the sake of convenience, according to the nature of the items.

That is, I think, sufficient to dispose of the first point, and I would only add that in *Ottaway* v. *Hamilton* (2) the bill of costs was made out and delivered, as here, in two parts, and no objection was taken to it. No doubt the point was not raised there; but it is, I think, worthy of notice that no objection was in fact taken to the form of the bill.

The next objection taken to the bill is in respect of the items in regard to the proceedings before the justices. It is said that those items were not so described, and that therefore, being inaptly described, the bill is bad. It must, I think, be admitted

(1) 1 Man. & G. 54. (2) (1878) 3 C. P. D. 393.

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that it is not very artistically drawn. It is headed, as I have said, "In the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce)," and yet many of the items are not for costs incurred in the High Court at all. But when the bill is examined I think that it is fairly clear where the one set of items ends and the other set begins. The question has been frequently discussed whether a bill of costs is insufficient, and consequently bad, because the name of the Court in which the work has been done is not given. The Court of Queen's Bench and the Court of Exchequer differed in their views on this question, and it appears that in the Court of Common Pleas there are decisions both ways.

In *Cook* v. *Gillard* (1), where all the conflicting decisions are cited, Lord Campbell C.J., who delivered the judgment of the Court, said (2): "A client has no ground of objection to a bill who is in possession of all the information that can be reasonably wanted for consulting on taxation." That is, I think, the principle on which Courts should act in allowing or disallowing a bill of costs.

In *Haigh* v. *Ousey* (3) Lord Campbell C.J. said: "In *Cook* v. *Gillard* (1) we laid down the principle that the Legislature intended, 'while it secured the client a right to reasonable information respecting the bill before an action should be brought upon it, at the same time to give the attorney security that the delivery of a bill intended to give and giving all requisite information should be a compliance with the Act, unless the client could shew that information which was really wanted had been withheld.' Applying this to the present bill, it seems to me to contain all that the Legislature intended to require. . . . . I do not think that the Legislature intended to throw on a solicitor the burthen of preparing a bill such that another solicitor on looking at it should, without any further statement, see on the face of the bill all information requisite to enable him to say if the charges were reasonable."

I accept those decisions in preference to the decisions in the Exchequer, and I am of opinion that the bill in the present case

(1) (1852) 1 E. & B. 26. (2) Ibid. at p. 37.
(3) (1857) 7 E. & B. 578, at p. 583.

gives all the information that can be reasonably required. It follows, therefore, that the second point fails also.

Then comes the question as to whether the costs incurred before the justices can be recovered.

On this point I think it is sufficient to refer to the case of *Cale* v. *James* (1), which is of course binding upon me, and in which it was held that these costs are not recoverable. It is not necessary, therefore, for me to express any opinion on that question.

I think, however, and in fact it has been admitted, that the inclusion in a bill of costs of items which cannot be recovered does not necessarily make the whole bill bad; it is only bad in respect of those items.

It is said, however, that if some of the items are wrongly described, and therefore ought not to have been inserted in the bill, that does make the bill bad. I have already said that in my opinion there has been no misdescription of the items, and therefore it becomes unnecessary to decide this point; but if it were, *Cook* v. *Gillard* (2) and *Haigh* v. *Ousey* (3), and the principle laid down in those cases, shew, I think, that a bill would not necessarily be rendered bad by the mere misdescription of some items. Again, I should prefer to follow on this point also the decisions in the Queen's Bench rather than the earlier decisions in the Court of Exchequer.

In my opinion, therefore, all the objections taken on behalf of the defendant fail, and there must be judgment for the plaintiffs on the bill subject to taxation.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendant: *C. P. Fielder, Le Riche & Co., for A. J. Stead, Manchester.*

(1) [1897] 1 Q. B. 418. (2) 1 E. & B. 26.
(3) 7 E. & B. 578, at p. 583.

A. P. P. K.

C. A.
1907
Dec. 11

[IN THE COURT OF APPEAL.]

ANDREW *v.* BRIDGMAN.

Landlord and Tenant—Lease—Covenant not to assign without Consent—Payment for Leave to Assign—"Fine or Sum of Money in the Nature of a Fine"—Conveyancing Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing Act, 1892, does not make illegal the payment and acceptance of a fine for the lessor's consent to the assignment of a lease which contains a covenant against assignment without consent. If such a payment is made by a lessee, not under protest, he cannot recover it back. If consent is refused except on payment, the lessee is entitled to disregard the covenant and assign without consent.

Decision of Channell J., [1907] 2 K. B. 494, affirmed.

The plaintiff in this action was the lessee of certain premises in Kentish Town under a lease granted by the defendant which contained a covenant by the lessee that "The lessee will not assign, underlet, or part with the possession of the premises or any part thereof without the consent of the lessor first had and obtained."

In April, 1906, the plaintiff agreed to assign the lease to one Agate, and her solicitor by her instructions applied to the defendant for her consent. The defendant refused to consent unless the plaintiff paid her 45*l.* The plaintiff's solicitor objected that this was a demand for a fine or premium for her consent to the assignment, contrary to the provisions of s. 3 of the Conveyancing Act, 1892. (1) Some negotiation followed, but the defendant insisted, and ultimately the plaintiff paid the 45*l.*, and a receipt was given "for 45*l.* paid for a

(1) Conveyancing Act, 1892, s. 3: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

licence"; the plaintiff also paid 5*l.* in respect of the costs of drawing up the licence.

The plaintiff brought this action to recover the 45*l.* as being an illegal payment made under protest and under duress.

There was some conflict of evidence as to whether the payment was made under protest; but Channell J. held it was not so made, and dismissed the action.

The plaintiff appealed.

R. F. Colam, for the appellant. The payment made by the appellant was involuntary, and made under pressure. It is unnecessary to prove that it was made under protest. *Fraser* v. *Pendlebury* (1) shews that there may have been undue pressure, though the appellant may have yielded merely because she was ignorant of her legal rights. Even if there was, as Channell J. thought, some compromise of claims against the appellant, the letters and receipt shew that this money was paid for the licence, and not as part of the compromise. The suggestion of Vaughan Williams L.J. in *Waite* v. *Jennings* (2) that the lessee could in a similar case assign without a licence is a dictum only, and could not be acted on in practice, because no purchaser would accept such an assignment. The decision practically deprives lessees of the protection which the Legislature intended to give them.

Schiller, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an appeal from Channell J., who held that the plaintiff is not entitled to recover 45*l.*, which she paid to the defendant under the circumstances stated in the report of the case in the Court below. (3) I accept the finding of fact by the judge that the payment of the 45*l.* was not made under protest.

Nothing which I say must be regarded as having any bearing upon a case where payment is made under protest. In such a case the money may, or may not, be recoverable. The facts here are these: The lease contained a covenant by the lessee not to assign, underlet, or part with the possession of the premises, or

(1) (1861) 31 L. J. (C.P.) 1. (2) [1906] 2 K. B. 11, at p. 16.
(3) [1907] 2 K. B. 494.

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any part thereof, without the consent of the lessor. That must be read having regard to s. 3 of the Conveyancing and Law of Property Act, 1892. [His Lordship read that section.] A sum of 45*l.* was asked for by the defendant and paid by the plaintiff, according to the terms of the receipt, as a payment for a licence to assign. If that had been an illegal payment, different considerations would have arisen, but it has been held by the Court of Appeal in *Waite* v. *Jennings* (1) that the Act does not make the payment illegal. Stirling L.J. said in his judgment in that case: "It does not seem to me that the taking of the fine would be illegal so that the assignee who paid it could recover it back." And, though that is the observation of Stirling L.J. alone, it met with no dissent from the other members of the Court of Appeal. If that be so, we must read the words of the proviso in the Act into the covenant in the lease. When that is done we get a covenant with a proviso analogous to the very usual proviso in a covenant not to assign without licence, that such licence shall not be unreasonably withheld; and by a series of authorities which I should be very sorry to disturb—one of which is *Treloar* v. *Bigge* (2), followed in *Sear* v. *House Property, &c., Society* (3)—it has long been settled that the effect of a proviso of that kind is not to impose an obligation on the lessor to give a consent, but, in case it is unreasonably withheld, to release the lessee from the obligation of the covenant and to enable him to assign without obtaining any licence. That is the view expressed by Vaughan Williams L.J. in *Waite* v. *Jennings* (4), where he said: "It may well be that, as between the parties to the lease, the lessee would have been entitled to disregard the absence of a licence, if the lessor refused to grant one unless and except upon the condition of a covenant for the payment of rent during the term." It is true that that is a dictum only, but it is, in my opinion, in accordance with the law. I do not therefore regard this decision, as the judge in the Court below seems to have done, as in any way rendering this most useful and valuable provision of s. 3 of the Conveyancing and Law of Property Act, 1892, a nullity. On the

(1) [1906] 2 K. B. 11.
(2) (1874) L. R. 9 Ex. 151.
(3) (1880) 16 Ch. D. 387.
(4) [1906] 2 K. B. 11, at p. 16.

contrary, the refusal by the lessor to give his consent, except on payment of a fine, relieves the lessee from the necessity of obtaining the lessor's consent, and enables him to ignore the restriction on assignment contained in the lease. On this one ground, that the payment was not illegal and was not made under protest, I agree that the claim to recover the money must fail.

FLETCHER MOULTON L.J. In the circumstances of this case I am of opinion that the judgment appealed from is right. I am by no means disposed to undervalue the importance of s. 3 of the Conveyancing and Law of Property Act, 1892, or to think that the Legislature intended that provision to be a matter which might lightly be evaded by lessors. On the contrary, I adhere to the language which I used in *Waite* v. *Jennings* (1), that "the Legislature declares that the power to refuse consent to assign is not to be made a source of profit to the lessor." But I also agree with the judgment in *Waite* v. *Jennings* (1) to the effect that the Legislature has not made a payment under these circumstances illegal, but has contented itself with saying that there shall be read into the original lease a proviso that no money shall be payable by the lessee in respect of granting the licence. In the present case, therefore, we must take it that there is a proviso in the lease that no money shall be payable by the lessee for this consent by the lessor. When the lessor refused to give her consent unless money was paid the lessee was entitled to act as if consent had been given. The lessee did not take that course, but paid the lessor a sum of money in respect of this claim and some other outstanding matters, and the judge in the Court below has held that the payment was not made under protest. In other words, instead of relying on her rights under the lease as modified by the statute, the lessee chose to pay this sum of money to the lessor, and under these circumstances it cannot, in my opinion, now be recovered back. The question what would have been the rights of the parties if the payment had been made under protest is not one which we have to consider.

(1) [1906] 2 K. B. 11, at p. 17.

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FARWELL L.J. I agree with the judgment delivered by the Master of the Rolls, and I desire to express no opinion upon the question what the result would have been if the payment had been made under protest.

I agree with Channell J. that the section of the Act must be read into the lease as a proviso qualifying the covenant. We are familiar with legislation which deprives parties of the power to contract in certain cases, but that is not what the Legislature has done in this instance. It has left it open to the parties to vary the proviso in the same way as they could vary the covenants in the lease. That being so, I think that the judge was well founded in saying that, though there may be duress in a man's insisting on rights which he has not got, there is no duress in his merely standing out for the rights which he has.

It is open to the lessor to say, "I will not consent except on such terms as I think fit," and then if the terms are inconsistent with the provisions of s. 3 of the Conveyancing and Law of Property Act, 1892, the lessee can disregard the covenant, but the lessor is entitled to say that he will only consent on his own terms. I should be sorry to think that any decision of this Court would render that section inoperative; but I do not think that our decision will have any such effect, since in such a case the lessee is entitled to act as if the consent had been given, and the law on this point has, in my opinion, been settled for years in the way in which the Master of the Rolls has stated it.

Appeal dismissed.

Solicitors: *Bowkers; Godfrey & Webb.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.
1907
Dec. 17, 18.

ANDERSEN *v.* MARTEN.

Insurance (Marine)—Warranty of Freedom from Capture—Capture of Neutral Ship by Belligerents—Subsequent Loss by Perils of the Sea—Condemnation—Relation back of Title of Captors.

A neutral ship carrying a cargo of contraband destined for the ports of one belligerent was captured by a cruiser of the other belligerent, and while being navigated by the captors towards a prize court was wrecked and became a total loss. She was afterwards condemned by the prize court as a lawful prize. The owner had effected a time policy on disbursements in respect of the ship. By the terms of the policy the disbursements were to be deemed to be totally lost if and when the ship was totally lost; and it was "warranted free from capture, seizure and detention, and the consequences of hostilities." In an action against an underwriter of the policy Channell J. held, [1907] 2 K. B. 248, that, although the capture did not of itself divest the owner's property in the ship, the subsequent condemnation caused the title of the captors to relate back to the date of the capture, so that the owner had no insurable interest in her at the time she was wrecked, and accordingly could not recover on the policy.

On appeal from that decision:—

Held that, as between the owner and the insurer, the question of relation back of the captor's title was immaterial, the true view of the facts being that the owner had lost his ship by capture and the captors had lost their prize by shipwreck, and, loss by capture being excepted from the policy, the owner could not recover.

Decision of Channell J. affirmed.

In the case of the seizure of an enemy's vessel, the subsequent condemnation by a prize court divests the property of the owner as from the date of the seizure.

Semble, that the same rule applies in the case of seizure of a neutral vessel.

Appeal from the decision of Channell J.(1)

In the action the plaintiff claimed to recover under a time policy of marine insurance, dated January 11, 1905, on disbursements for the steamship *Romulus*, of which he was the owner. The defendant was an underwriter of the policy. The policy was in the ordinary Lloyd's form, but had attached to it the following, amongst other, clauses: "Warranted free from all average, being against the risk of total loss only. A total loss

(1) [1907] 2 K. B. 248.

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or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under the policy"; and, "Warranted free from capture, seizure and detention, and the consequences of hostilities."

The circumstances under which the ship was used and ultimately lost are fully set out in the report in the Court below. Shortly stated they were as follows. During the Russo-Japanese war the ship, being bound for Vladivostock with a cargo of coal, was damaged by floating ice, and was captured by a Japanese cruiser. The Japanese commander put her in charge of an officer and crew, who endeavoured to take her to the naval port of Yokosuka, where there was a prize court. While upon this voyage she encountered heavy weather, and, being in a dangerous condition, she was beached and became a total wreck. She was afterwards condemned by the Japanese prize court as a lawful prize. The plaintiff claimed that at the time the ship was lost by the perils of the sea his property in her had not been divested by the capture, and that he was entitled to recover on the policy.

Channell J. gave judgment for the defendant, on the ground that, although the capture did not of itself divest the plaintiff's property in the ship, the effect of the subsequent condemnation was to cause the title of the captors to relate back to the date of the capture, so that the plaintiff had no insurable interest in her at the time she was lost by perils of the sea.

From this decision the plaintiff appealed.

J. A. Hamilton, K.C., and *Balloch*, for the appellant. The vessel was not lost by capture; at the time she was wrecked she was still in the possession of her owner, being navigated by her master and crew. The ownership in the vessel is not taken away until there has been a condemnation by the prize court. The proposition in Abbott on Shipping (11th ed. 1867, by Mr. Justice Shee, at p. 24), on which Channell J. relied, that the title of the captors relates back after sentence of condemnation to the date of the capture, does not apply to the arrest of a neutral vessel. *Stevens* v. *Bagwell* (1),

(1) (1808) 15 Ves. 139.

Morrough v. *Comyns* (1), and *Alexander* v. *Duke of Wellington* (2), when examined, do not bear out that proposition; they relate to the seizure of an enemy's vessel and to prize money, and they are clearly distinguishable on that ground from a case like the present, which is a seizure of a neutral vessel. Even in cases of capture from an enemy, no property in the vessel passes until sentence of condemnation has been passed: *Goss* v. *Withers*. (3) The owner's right to give notice of abandonment to the underwriters in case of capture is strong evidence that the ownership is not changed by the actual capture; the owner here retained his property in the vessel down to the time of condemnation and, before sentence was pronounced, the vessel was lost through the perils of the sea, and consequently there was a total loss under this policy, and the appellant is entitled to recover. In Hall's International Law, 5th ed. p. 734, it is stated that the property remains in the neutral, whose vessel has been seized, until judgment of confiscation has been pronounced; this is stated without any qualification, as would have been the case had this doctrine of relation back to the date of capture been correct.

The reasons why this condemnation is required are discussed in *The Flad Oyen* (4), where the instrument of confiscation is referred to as "one of the title deeds of the ship on sale." So, too, in *Hamilton* v. *Mendes*. (5) None of the text-books, such as Pitt Cobbett's Leading Cases on International Law, 2nd ed. p. 208, and Marshall on Insurance, 1823 ed. p. 503, make any reference to this doctrine of the title relating back to the date of capture. The same rules appear to apply in America: Kent's Commentaries on American Law, 12th ed. p. 108; see also Holland's Naval Manual, p. 83. In Park on Marine Insurance, 8th ed. vol. 1, p. 158, it is stated that by the marine law of England, as practised in the Court of Admiralty previous to the passing of any Act of Parliament which commanded restitution or fixed the rate of salvage, it was held that the property was not changed, so as to bar the owner in

(1) (1748) 1 Wils. 211.
(2) (1831) 2 Russ. & My. 35.
(3) (1758) 2 Burr. 683, at p. 694.
(4) (1799) 1 C. Rob. 135.
(5) (1761) 2 Burr. 1198.

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favour of a vendee or recaptor, till there had been a sentence of condemnation: see also *Cory* v. *Burr*. (1)

A sentence of condemnation may have a retrospective effect in this sense, that it constitutes a ratification of the transfer of the property by the captor to any intermediate purchaser, which binds the owner just as if he had personally ratified what had been done. The nearest case of relation back is afforded by *The Falcon*. (2) There is no reason for making the condemnation date from any earlier period than that of the actual sentence. It is the sentence of condemnation which divests the property. There is a distinction between the right to arrest and bring to trial the property of a neutral and the right to loot the property of an enemy. A belligerent is not entitled to take the law into his own hands and destroy the property of a neutral. It is different in the case of enemy's property: *The Actæon* (3); *The Felicity*. (4) *Ruys* v. *Royal Exchange Assurance Corporation* (5) shews that it is not necessary to wait for the decision of the prize court in order to determine the issue in an action between the owner and the underwriter.

On the grounds of public interest, practical convenience, and absence of authority, there is no reason for saying that the sentence of condemnation by a prize court in the case of a neutral vessel operates any earlier than the date of actual pronouncement. Relation back in bankruptcy is the creature of statute, and is not a doctrine of general application. [They also referred to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 7, sub-s. 1, and to *Sailing Ship Blairmore Co.* v. *Macredie*. (6)]

Scrutton, K.C., and *Bailhache*, for the respondent. The true view of this case is that the owner lost his ship by capture and the Japanese lost their prize by shipwreck. The question in whom was the property in the ship during the time when she was being navigated to the port of the prize court is immaterial. Such an inquiry is only material where there has been a capture

(1) (1883) 8 App. Cas. 393.
(2) (1805) 6 C. Rob. 194.
(3) (1815) 2 Dod. 48.
(4) (1819) 2 Dod. 381, at p. 385.
(5) [1897] 2 Q. B. 135.
(6) [1898] A. C. 593.

and a recapture. In *Goss* v. *Withers* (1) Lord Mansfield said the question was immaterial as between insurer and insured: see also *Hamilton* v. *Mendes*. (2)

If in addition to the policy in this case there had been another insuring against war risks, it could not be doubted that the loss would fall under the second. The converse of this case is afforded by *Hahn* v. *Corbett*. (3) *Livie* v. *Janson* (4) has some application, but it is not so near as *Hahn* v. *Corbett*. (3) Apart from any question of relation back, the judgment appealed from is right. [On the question of the doctrine of relation back they referred to *Lecaux* v. *Eden* (5), *Morrough* v. *Comyns* (6), and *Stevens* v. *Bagwell*. (7)]

Balloch, in reply. The condemnation after the loss by peril of the sea could not affect the right to sue on this policy. *Livie* v. *Janson* (4) is said to have been wrongly decided: 1 Phillips on Insurance, 5th ed. p. 680, par. 1136. *Hahn* v. *Corbett* (3) is distinguishable, on the ground that in this case, when the vessel was wrecked, there was a possibility that there never would be any condemnation at all. The loss was caused by the peril of the sea, and the appellant is entitled to recover.

COZENS-HARDY M.R. I rather regret that, having regard to the near approach of the end of these sittings, and the fact that the Court will be differently constituted next sittings, it is desirable that we should give judgment at once. For I could have wished to have put my observations somewhat more into shape. But as I have arrived at a conclusion satisfactory to my own mind, that the judgment of Channell J. was correct, I think I had better shortly state how the matter presents itself to me. We are dealing here with a policy of a peculiar form. It is a policy on disbursements. It is not a policy on the hull or the cargo, but simply on disbursements; and one of the clauses in the policy is this: "Warranted free from all average, being against the risk of total loss only, a total loss or constructive

(1) 2 Burr. 693.
(2) 2 Burr. 1198.
(3) (1824) 2 Bing. 205, at p. 210.
(4) (1810) 12 East, 648.
(5) (1781) 2 Doug. 614, n.
(6) 1 Wil. 211.
(7) 15 Ves. 139.

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total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." Then, further, there is this clause: "Warranted free from capture, seizure and detention, and the consequences of hostilities." Now the facts with which we have here to deal are these. The vessel was a vessel taking a contraband cargo—contraband, that is to say, in the view of both the belligerents engaged in war, namely, the Russians and Japanese. It was on its way, as found by the prize court, which ultimately dealt with it, to Vladivostock. The captain I believe said, although he was apparently going that way, that he was minded to put into a Japanese port, the name of which I forget, near the straits through which he was wending his way. His vessel had been more or less damaged by ice, with the result that she was making very slow progress. At 7 o'clock in the morning she was stopped by a Japanese cruiser and examined and seized; and a prize crew under a lieutenant was put on board. That being the case, she was diverted from her course, and whether her course was towards Vladivostock or towards the Japanese port is immaterial for our present purpose. She was diverted from her course and taken into the open sea, and, being in a very damaged condition, was going very slowly, and the sea being very rough she was either purposely beached or was driven on shore—I am not quite sure which it was—with the result that her back was broken and she became a wreck. The matter was brought before a Japanese prize court, and the Japanese prize court held that the capture was legal and valid, and it is not disputed that the judgment of the Japanese court as from some date, and for some purposes at all events, was a judgment in rem which shifted the property. We have listened to a very learned and interesting argument as to whether the judgment of the prize court in a case like this, dealing with a neutral vessel condemned for carrying contraband, does or does not change the property as from the date of the seizure. I think the authorities shew that that is the case where the seizure is of an enemy's vessel; and I do not desire to indicate any opinion adverse to the view that it also applies to the case of a judgment dealing with the seizure of a neutral vessel. It seems to me that it is really not necessary for us to

give a final decision upon that point, for the authorities, to which our attention has been called, seem to me to shew that, as between the assurer and the assured, the question of the transfer of property is not, or is probably not, a material consideration—certainly not a material one in the present case. On reading the present policy, it is clear that a loss by capture is exempted from the policy; and, if the true view is that the loss has accrued by capture, anything subsequent to the capture seems to me to be immaterial and unimportant. Now, the ship was de facto seized by the Japanese at 7 o'clock on the morning I have mentioned. De facto the prize crew, with a lieutenant in charge, was put on board. That seizure might, or might not, be an abnormal and illegal one, but it has been decided by the prize court, which alone has jurisdiction in dealing with the matter, and whose decision is binding on all parties as a judgment in rem, that the seizure was lawful, and the ship was, therefore, lost by reason of the capture. Now it seems to me that, as to all proceedings in the Japanese Court, what happened after the seizure was entirely irrelevant and of no moment whatever. The question which the Japanese Court were deciding was—Aye or No, was that vessel lawfully and well seized as being a neutral vessel carrying contraband under circumstances which rendered it liable to condemnation? They found it was. That, therefore, was the cause of the loss, and that is a loss which is excepted from the policy. The fact that after the seizure, and on its way to port, the ship became a wreck is an irrelevant circumstance, and one which does not enable the plaintiff to say that the loss occurred from the perils of the sea as distinct from the perils of capture. I venture to say that in this case, as I hope in many others, if not in all, the law agrees with common sense, and I desire to adopt and accept what Channell J. said: "I think that most people, looking at the matter from a common sense point of view and apart from technicalities, would say that under the circumstances the owner lost his ship by capture, and that the Japanese captors afterwards lost their prize by shipwreck." That, I think, is the correct view, and in my judgment that is sufficient to dispose of this case. I do not think it is necessary to refer in detail to the numerous authorities which were cited.

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I will only mention the case of *Hahn* v. *Corbett* (1), which seems to me to be singularly analogous, because there the vessel, through the perils of the sea, was driven on a sand bank, or met with some disaster by the sea, and, being there, she was afterwards captured in that state by the enemy. It was held that the underwriters, who had insured against the perils of the sea, were liable—that being the first and the real cause of the loss—and that the subsequent capture made no difference. So here the capture was the real cause of the loss, and the subsequent perils of the sea were an irrelevant matter for all the purposes we have to consider. In my view the judgment of Channell J. was quite right, and the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion, and agree with the judgment which has just been delivered in its entirety. To my mind the only question involved here is a simple question of fact—namely, what was the cause of the loss of this vessel to the owners? The policy is one which would include almost all possible risks, and certainly all risk of capture, if it were not that by a slip attached to it the risk is "warranted free from capture, seizure and detention, and the consequences of hostilities"—in other words, those particular risks, although included in the wide words of the policy, are excepted. Accordingly we have to consider whether the loss in this case is by one of those excepted risks or not. In other words, the question before the Court is, Aye or No, under a policy which covered loss from "capture, seizure, detention and the consequence of hostilities," could the owner, under these circumstances, recover? It appears to me that this loss was unquestionably a loss by capture. A plain, common sense man would have no hesitation in taking that view; and I can see no rule of law which would prevent a Court following the dictates of good sense in the same way. The ship was seized by a cruiser of the Japanese Government under circumstances which shew that that act was intended to be, and was in fact, a seizure, and she was taken for the purpose of condemnation to the prize court. An accident happened on the way; but, nevertheless, the question whether this was a proper and

(1) 2 Bing. 205.

effective seizure did come before the prize court, and a judgment in rem was pronounced, which settled for all the world the question that it was an effectual seizure. Under those circumstances, I cannot see how we can come to any other conclusion of fact than that this vessel was lost to the insured by seizure. If nothing else had happened that must have been the consequence of the seizure. It is said that before the actual condemnation was pronounced the vessel had been destroyed by perils of the sea; but I agree with the Master of the Rolls in regarding that as immaterial. The prize court could not have gone into it. What the prize court decided was the fact of the seizure. It decided that the seizure was a seizure which took the ship effectually away from the owner and made it the property of the captors. We have been pressed very much by the suggestion that there is in such matters no doctrine of relation back. In my opinion the doctrine of relation back is not involved in our decision in this case. The question is whether or not there was a total loss to the insured by reason of the seizure, and the fact that an authoritative determination of that matter could only occur at some future time appears to me not to affect in the least the question whether the loss occurred really at the moment of and by reason of the capture. A question that I put during the course of the argument I think illustrates it. Supposing there is a time policy against capture and, during the currency of that policy, a proper capture (as this was) is made, but that the actual adjudication that it was a proper capture such as would deprive the owner of the ship of his property is not made until after the expiry of the policy, can it be doubted that there would have been a loss by capture within the period covered by the policy? Personally I do not think it can. I am therefore of opinion that the judgment of Channell J. was right, and that this appeal ought to be dismissed.

FARWELL L.J. I am of the same opinion. I have very little to add. The writ was issued on September 16, 1906. The final decision of the prize court at Yokosuka was on May 16 of the same year. So that at the date of the writ there was no outstanding question or doubt, but the

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rights of all parties had been finally settled. Test the case in this way. Supposing there had been an insurance of a vessel against loss by perils of the sea by one person, and against capture by another. Is it not absolutely plain that in a case like the present the second insurer would have had to pay, and not the first? I can see no reason whatever why the second insurer should escape when the actual events have happened; nor does it appear to me material to suggest that if there had been an assurance of that sort, and notice of abandonment had been given, that the insurer would have to step into the insured's shoes, because that is merely a contract between the parties that the one should be subrogated to the other's position under certain circumstances. It leaves the rights as regards the vessel itself absolutely untouched. When the final decision is given it is a decision in rem, and the ship has then become, and from the date of capture has been, rightly and lawfully seized. I agree I do not think it is necessary for us to consider the doctrine of relation back in the present case. We have the fact of the capture and the fact of condemnation both taking place before the writ was issued. It seems to me the decision was perfectly right and must be affirmed.

Appeal dismissed.

Solicitors for appellant: *Woodhouse & Davidson.*
Solicitors for respondent: *Crump & Son.*

G. A. S.

ZICK *v.* LONDON UNITED TRAMWAYS, LIMITED.

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Dec. 6.
1908
Jan. 13.

Lands Clauses Acts—Notice to Treat—Creation of New Interest—Agreement for Tenancy—Surrender—New Agreement—Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 18.

On May 15, 1905, the defendants served upon the landlords of certain premises a notice to treat for the purchase thereof, the premises then being in the occupation of a tenant under an agreement in writing for a term of three years from March 14, 1905. After negotiations for a transfer of the tenancy to the plaintiff, ultimately, on February 14, 1906, the landlords, with the concurrence of the tenant, agreed to let to the plaintiff, who agreed to take the premises for a term of three years from that date on conditions in other respects similar to those of the former tenancy. The defendants, without notice to the plaintiff or to the former tenant, entered upon the premises and deprived the plaintiff of the use thereof.

In an action of trespass by the plaintiff against the defendants it was agreed that the question to be tried should be whether the plaintiff was a person entitled to compensation under the Lands Clauses Consolidation Act, 1845, in respect of his tenancy:—

Held that, notwithstanding the surrender by operation of law of the former tenancy and the creation by the landlords after notice to treat of a new tenancy in the plaintiff, the latter was nevertheless entitled to compensation in respect of his interest in the premises during the period ending March 14, 1908, inasmuch as the new tenancy did not as regards that period impose any additional burden upon the defendants.

Trial of action before Jelf J. without a jury.

The following statement of the facts is taken from the written judgment of the learned judge:—

The action was in form an action for trespass brought by the plaintiff Zick, who was the occupier of a shop, house, and forecourt, numbered 84, Merton High Street, Wimbledon, and carried on business there as a furniture dealer, to recover damages from the defendant company for entering and trespassing upon the plaintiff's premises on March 20, 1907, and the following days, and for depriving him of the use of the said forecourt and thereby interfering with his business.

On the pleadings the defendants, besides putting the plaintiff to the proof of his case, set up the following defence: That by the London United Tramways Act, 1902 (2 Edw. 7, c. ccxlvii.), incorporating the Lands Clauses Consolidation Act, 1845, they

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were authorized to acquire compulsorily the said forecourt for widening the roadway; that on May 28, 1905, they served notice to treat on Coope and Heatley, the leaseholders being mortgagees in possession of the said premises and forecourt, for the purchase of their interest in the said forecourt; that at the date of the service of such notice the plaintiff was not the occupier nor in possession of the said premises or forecourt, and had no interest therein; that, notwithstanding the service of the said notice, Coope and Heatley purported after the date of such service to grant to the plaintiff an interest in the said premises and forecourt by means of an agreement of tenancy, and that such an agreement of tenancy was invalid in law against the defendants; that after the service of the said notice, and before the alleged trespass, the defendants, having obtained the consent of all the parties interested in the said premises and forecourt, and having complied with the Lands Clauses Consolidation Act, 1845, requested the plaintiff to remove his goods from the said forecourt, and, on his refusal, entered thereupon under their statutory powers, and not otherwise; and that this was the trespass complained of. In the alternative, while denying liability, they paid 40*s.* into Court.

The plaintiff in his reply joined issue, and further pleaded that at the date of the service of the notice to treat one Sinclair was tenant in possession of the said premises under an agreement in writing dated March 15, 1905, for a term of three years from March 14, 1905; that in February, 1906, Sinclair transferred his interest to the plaintiff; that no notice to treat was at any time served by the defendants upon Sinclair or the plaintiff, nor had either of them at the date of the said transfer, or at the date of the agreement hereinafter mentioned, any knowledge or notice of the service of the notice to treat; that on February 14, 1906, the plaintiff surrendered the aforesaid agreement to the lessors of the said premises, and in lieu thereof accepted an agreement of tenancy of the said premises for a term of three years from February 14, 1906; and he contended that he was entitled to stand in the same position as if he still occupied under the original agreement of tenancy, namely, for three years from March 14, 1905.

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The pleadings were completed in June, 1907; but by correspondence in November, 1907, the parties agreed, in order to save expense and delay, that this action should be tried by a judge without a jury; that the sole question at the hearing should be whether the plaintiff was a person entitled to be compensated by the company under the Lands Clauses Consolidation Act, 1845, in respect of the acquisition by the company of the said forecourt; and that, in the event of the judge deciding the above question (subject to appeal) in the plaintiff's favour, he should recover nominal damages, namely, 40*s*., with costs on the High Court scale, and that the defendants should take the necessary steps to have a jury summoned under the Act to assess the compensation payable.

The following facts were proved or admitted:—

By agreement dated March 15, 1905, one Fellowes, as solicitor and agent for the mortgagees in possession, agreed to let to Sinclair, and Sinclair agreed to take, the premises in question for three years from March 14, 1905, at the yearly rent of 30*l*. payable monthly, and he carried on there the business of a furniture dealer.

On May 15, 1905, the defendants served on Fellowes a notice to treat for the purchase of the premises in question, addressed to Fellowes and all other persons having or claiming any estate or interest in the lands and hereditaments.

By an agreement dated January 23, 1906, Sinclair sold to the plaintiff Zick the furniture and effects in the shop and premises, with certain exceptions, for 50*l*., and agreed to stand possessed of the lease of the premises in trust for Zick, his executors, administrators and assigns; and in February, 1906, Zick entered and Sinclair became his manager.

Sinclair, in order to give Zick not only the beneficial, but the real, possession of the premises, then informed the agent of his landlords, Fellowes, that he desired to transfer to Zick the unexpired portion of his tenancy, and Fellowes said he thought he could arrange with his principals for the surrender of the existing tenancy and the granting of a fresh agreement to Zick for a term of three years, instead of Zick only taking a transfer of a term which had only two years to run, and, as this proposal

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appeared to be favourable to Zick, he accepted it, neither Sinclair nor Zick having any notice or knowledge of any notice to treat.

Accordingly, by an agreement dated February 14, 1906, Fellowes, as solicitor and agent for the mortgagees in possession, agreed to let to Zick, and Zick agreed to take, the premises in question for three years from February 14, 1906. This new tenancy would not expire till February 14, 1909, but the original tenancy, if it had been transferred to Zick, would have expired on March 14, 1908.

In this state of things the defendants, without any notice to the plaintiff Zick or to Sinclair, entered upon the plaintiff's premises on March 20, 1907, and the following days up to March 26, 1907, took up part of the pavement of the said forecourt, and otherwise deprived the plaintiff of the use of the said forecourt, and this was the trespass complained of.

H. Dobb, for the plaintiff.

Roskill, K.C., and *Lynden Macassey*, for the defendants.

The arguments of counsel sufficiently appear from the judgment.

1908. Jan. 13. JELF J. This case, which was tried before me without a jury on December 6 last, raised an important question under the Lands Clauses Consolidation Act, 1845.

It was contended on the part of the plaintiff that the defendants were liable to him in damages for a trespass upon his property, and that he was a person entitled to compensation under the Lands Clauses Consolidation Act, 1845, from the defendants for the compulsory taking of the said forecourt as regards his interest in the said premises down to March 14, 1908.

For the defendants it was contended that after the date of the service of the notice to treat the landlords or their agent, Fellowes, could not as against the defendants create any fresh tenancy in the plaintiff; that the original tenancy was surrendered by operation of law by the plaintiff to Fellowes on the granting of the new tenancy for a longer term on February 14, 1906, so that at the date of the alleged trespass the plaintiff had

no interest, as he no longer held under the original tenancy, and, as to the new tenancy, this was invalid against the defendants either as founding an action of trespass or as giving a right to compensation; and that the plaintiff was relegated to a cause of action against Fellowes or his principals for breach of covenant for quiet enjoyment.

The law appears to be clear to this extent, that the owner of property cannot, after being served with a notice to treat, create a fresh tenancy so as to increase the burden which rests on the promoters: see the cases collected in Cripps on Compensation, 5th ed. (1905), p. 76; *Dawson* v. *Great Northern and City Ry. Co.* (1); *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (2); *Wilkins* v. *Mayor of Birmingham* (3); *In re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (4); also the cases collected in Hudson on Compensation, vol. 1, p. 156.

But it was urged on behalf of the plaintiff that the original agreement of tenancy to Sinclair was made before the service of the notice to treat on Fellowes, and created an interest to last till March 14, 1908; that if Sinclair had legally assigned that interest to the plaintiff Zick, the latter would have been a person entitled to be compensated under the Act, and entitled to sue the defendants for trespass if they acted, as they had done, without notice to him; and that the substitution of the new tenancy, lasting till February 14, 1909, for the original tenancy, lasting till March 14, 1908, did not, as regards the period ending March 14, 1908, to which the plaintiff's claim was confined, throw any additional burden upon the defendants; that, if the contention of the defendants was correct, the defendants would have got the plaintiff's interest for a year ending March 14, 1908, for nothing, while the plaintiff would have lost, without compensation, an interest for which he had given valuable consideration to Sinclair, and for which Sinclair had before service of the notice to treat given valuable consideration to the lessors. Such an interpretation of the Act of Parliament would, it was argued, run counter to the principles upon which such a statute

(1) [1905] 1 K. B. 260.
(2) [1904] A. C. 461.
(3) (1883) 25 Ch. D. 78.
(4) (1871) L. R. 12 Eq. 389.

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is construed, namely, that property is not taken away without compensation unless the intention that this shall be done is clearly shewn or clearly to be inferred.

Now I have come to the conclusion upon principle and upon the authorities that in the present case the burden on the company has not been increased as regards the period ending March 14, 1908, by what was done between Fellowes, Sinclair, and Zick, the two latter being at the time ignorant that the company had given the notice to treat and were putting in force their powers of compulsory purchase. In *Wilkins* v. *Mayor of Birmingham* (1) Mathew J., in giving judgment, says: "The object of the plaintiff is to establish his right to obtain compensation on the footing that he was a leaseholder for the term granted to him in 1879." (That is, after the act, which in that case was equivalent to service of the notice to treat.) "He is not here to assert that he is entitled to be compensated on the footing that there was a nine months' interest in a lease which was unexpired before the second lease was granted, and when the scheme was first launched, but he is here to insist that he was entitled in 1879 to acquire a further leasehold interest and that he is to be compensated for that"; and therefore the learned judge rejected the claim. In the present case, however, the plaintiff is confining his claim to the period of the original letting, which, in my opinion, makes all the difference. I think the surrender of the first agreement of letting in consideration of the letting for the larger term overlapping the residue of the first letting does not create a state of things disentitling the plaintiff to compensation for the period common to both lettings, and does not by a stroke of luck give the defendants that interest for nothing. The terms and character of the plaintiff's holding under the new agreement, apart from its length, are substantially the same as those of the original holding by Sinclair, the benefit of which was transferred by Sinclair to Zick.

Under these circumstances the plaintiff has a prima facie possessory title, and the defendants have failed to satisfy me that they have displaced it by a better title of their own under the statute. I therefore give judgment in the action for the plaintiff

(1) 25 Ch. D. 78, at p. 80.

for 40*s.* and costs on the High Court scale, and I declare that the plaintiff is entitled to be compensated under the Lands Clauses Consolidation Act, 1845, for his interest for the period ending March 14, 1908. And I give liberty to apply.

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Judgment for the plaintiff.

Solicitor for plaintiff: *A. E. Cubison.*

Solicitors for defendants: *Stanley, Wasbrough, Doggett & Baker.*

W. H. G.

[CROWN CASE RESERVED.]

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Jan. 11, 14.

THE KING *v.* STRIDE AND MILLARD.

Criminal Law—Pleading—Indictment—Sufficiency of Averments.

In an indictment for receiving stolen goods it is enough to allege that the prisoner received them knowing them to have been feloniously stolen, without further alleging that the stealing of them amounted to a felony at common law or under the Larceny Act, 1861.

An indictment charged that the defendant "one thousand pheasants' eggs of the goods and chattels of and of and belonging to W. G. feloniously did steal &c." It was contended for the defence that the indictment was bad in that it did not allege that the eggs had been reduced into possession, and that without such an averment the eggs, being those of a bird feræ naturæ, were prima facie not the subject of larceny:—

Held, that the words "of and belonging to," being in addition to the ordinary formal words "of the goods and chattels of," coupled with the fact that the large quantity of the eggs stolen suggested that they had previously to the stealing been taken from the nests and collected into one place, amounted to a sufficient averment that the eggs had at the time of the stealing been reduced into the possession of the person in whom the property was laid.

Rex v. *Rough*, (1779) 2 East, P. C. 607, distinguished.

Reg. v. *Cox*, (1844) 1 C. & K. 494, questioned.

CASE stated by Grantham J. for the opinion of the Court for Crown Cases Reserved.

The defendants were tried at the Chelmsford Assizes in December, 1907, upon an indictment which charged in the first count "that Herbert Wyndham Stride on the eighth day of May 1906 then being the servant to one Sir Walter Gilbey Baronet one thousand pheasants' eggs of the goods and chattels of and

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of and belonging to the said Sir Walter Gilbey his master feloniously did steal &c."; and in the second count "that the said Herbert Wyndham Stride and one Frederick William Millard afterwards to wit on the day and in the year aforesaid one thousand pheasants' eggs of the goods and chattels of and of and belonging to the said Sir Walter Gilbey before then feloniously stolen taken and carried away feloniously did receive and have they the said Herbert Wyndham Stride and the said Frederick William Millard at the time when they so received the said one thousand pheasants' eggs as aforesaid then well knowing the same to have been feloniously stolen &c."

The prisoner Stride was head-keeper to Sir Walter Gilbey, and had eight keepers under him. The practice with respect to the breeding of pheasants on Sir Walter Gilbey's shooting was as follows:—Directly the laying season began the under-keepers went regularly through the woods and picked up the eggs from the wild pheasants' nests and took them to hatching pens at the head-keeper's rearing place, and left them there in a place of safety till Stride wanted to put them under the domestic hens which were provided for him by his master. The 1000 eggs which formed the subject of the indictment were part of the eggs so taken by the under-keepers to the hatching pens, and were stolen by Stride after they had been so taken there. Stride sold the eggs to Millard, who received them knowing them to have been stolen.

The jury having found both prisoners guilty, counsel moved in arrest of judgment, upon the grounds—

(1.) That the indictment was bad, inasmuch as, wild pheasants' eggs being feræ naturæ, it did not allege that the eggs, which were the subject-matter of the indictment, had been reduced into possession at the time of the theft; and

(2.) That the second count of the indictment was bad in that it did not allege that the stealing of the pheasants' eggs was a felony either at common law or by virtue of the Larceny Act, 1861, and therefore did not set out all the necessary ingredients of the statutory offence created by s. 91 of that Act.

The judge overruled both objections, and sentenced the prisoners subject to a case for the opinion of the Court.

Avory, K.C., R. D. Muir, and *Graham Campbell*, for the defendant Millard. The defendant cannot be convicted of feloniously receiving the eggs unless it appear upon the indictment that the stealing of them by Stride amounted to larceny. An indictment for stealing chattels which are the subject of larceny only in particular cases or under certain circumstances must shew that they fall within the requisite description: Archbold's Criminal Pleading, 23rd ed. p. 76. Now larceny cannot be committed of animals which are feræ naturæ and are not reduced into possession, and prima facie an averment that a person stole an animal feræ naturæ must be understood to mean that he stole it while in its wild state and unreclaimed; and it is not enough to rebut that prima facie meaning to allege the animal to be "of the goods and chattels of" the prosecutor. Thus in *Rough's Case* (1), where the defendant was convicted of stealing a pheasant "of the goods and chattels of H. S.," it was held that the conviction was bad, "for in cases of larceny of animals feræ naturæ the indictment must shew that they were either dead, tame or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add 'of the goods and chattels' of such an one." And what is true of wild animals is equally true of their produce. Pheasants' eggs while in their nests in the woods are not the subject of larceny any more than the pheasants themselves. And prima facie the term "pheasants' eggs" in an indictment must mean pheasants' eggs in their natural condition in the nests. Here the indictment contains no averment to negative that prima facie meaning. The words "and of and belonging to Sir Walter Gilbey" add nothing to the words "of the goods and chattels of," and are mere surplusage. How strict the rule is as to the necessity of the indictment shewing that the thing alleged to be stolen is the subject-matter of larceny is well illustrated by the case of *Reg.* v. *Cox* (2), where an indictment for stealing "three eggs of the goods and chattels, &c." was held bad, Tindal C.J. observing: "For aught that appears on this indictment the eggs stolen might have been adders' eggs or some other species of eggs

(1) 2 East, P. C. 607. (2) 1 C. & K. 494.

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which cannot be the subject of larceny." In *Reg.* v. *Lonsdale* (1) the prisoners were indicted for receiving "ten fowls" knowing them to have been stolen. It was objected on behalf of the prisoners that the indictment could not be supported, as the word "fowls" was ambiguous, for it might be that the fowls were wild fowl. Pollock C.B. said that the subject of the charge "must be such, and must be stated to be such, as that it can be the subject of larceny. Here it is not so stated." In *Reg.* v. *Roe* (2), where the prisoner was indicted for stealing a dead partridge, and the proof was that the partridge was wounded and picked up by the prisoner while still alive, the conviction was quashed. Bovill C.J. said: "If the indictment had simply alleged that the prisoner had stolen one partridge it would have been bad, for to make a partridge the subject of larceny it must be shewn either that it was dead, or if alive that it was reduced into possession, or that it was under the owner's control." And Byles J. there expressed himself in similar terms. In the present case there is no averment that the eggs were in Sir Walter Gilbey's possession at the time when they were stolen by Stride, and the indictment therefore is bad as to both the counts. But it is also bad as regards the second count against the defendant Millard upon another ground. The offence of receiving stolen property is a purely statutory offence, and it is essential in an indictment for a statutory offence to allege the circumstances and the intent mentioned in the statute. The section which creates the offence of receiving—s. 91 of the Larceny Act, 1861—provides that "whosoever shall receive any . . . . property whatsoever the stealing . . . . whereof shall amount to a felony either at common law or by virtue of this Act knowing the same to have been feloniously stolen" shall be guilty of felony. The indictment here omits to aver that the stealing of the eggs was a felony either at common law or by virtue of the Larceny Act. It is true that the form of indictment for receiving given in Archbold's Criminal Pleading does not contain that averment. But the form is wrong. Some years ago attention was drawn at the Central Criminal Court to the

(1) (1864) 4 F. & F. 56. (2) (1870) 11 Cox, 554.

then existing practice of omitting that averment, and the practice was altered, and now indictments for receiving at that Court always contain the averment.

Danckwerts, *K.C.*, *Marshall-Hall*, *K.C.*, and *Valetta*, for the defendant Stride. The decision in *Reg.* v. *Cox* (1), which has already been referred to, was reaffirmed by Tindal C.J. in *Reg.* v. *Allen*. (2) This shews that *Reg.* v. *Cox* (1) was not a hasty or ill-considered decision. The case of *Rex* v. *Tate* (3) is to the same effect. There, the prisoners having been convicted of stealing five hens, Bolland B. arrested the judgment upon the ground that the indictment contained no averment that they were tame. The produce of living animals stands on the same footing as the animals themselves. If the animals are the subject of larceny, so will their produce be. Thus it is larceny to steal milk from a cow, or wool off the backs of live sheep: *Rex* v. *Martin*. (4) Conversely, as pheasants are prima facie not the subject of larceny, neither are their eggs.

Rawlinson, *K.C.*, *Ernest Wild*, and *Claughton Scott*, for the Crown. It is unnecessary that the indictment should contain any averment that the eggs were reduced into possession, for larceny may be committed of pheasants' eggs while they are in the wild pheasants' nests. In Blackstone's Commentaries, bk. 2, ch. 25, it is said that "A qualified property may subsist with relation to animals feræ naturæ, ratione impotentiæ, on account of their own inability. As when hawks, herons or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires; but till then it is in some cases trespass, and in others felony, for a stranger to take them away. For here as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake

(1) 1 C. & K. 494.
(2) (1844) 1 C. & K. 495.
(3) (1833) 1 Lewin, 234.
(4) (1777) 1 Leach, 171.

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him." And if that be true of the young of pheasants in the nests, a fortiori must it be true of pheasants' eggs before they are hatched.

[DARLING J. In 1 Hale, P. C. at p. 511, it is said: "Of young hawks in the nest larceny may be committed, but not of hawks' eggs." The reason which is there given, that "the takers are punishable by fine and imprisonment upon the statute of 11 Hen. 7, c. 17," shews that the taking of hawks' eggs was not an offence at all at the common law. And as in the same passage in Hale pheasants and hawks are treated as being in all respects upon the same footing, the inference is that pheasants' eggs in the nest are not the subject of larceny at common law, and there is no statute making them so.]

Secondly, assuming that it is necessary to reduce pheasants' eggs into possession to make them the subject of larceny, it is sufficiently alleged in the indictment that they were so reduced. The words "of the goods and chattels" of the prosecutor can have no meaning at all unless they mean that that has been done to the eggs which was necessary to make them the prosecutor's property. The proposition in *Rough's Case* (1), that "it is not sufficient to add 'of the goods and chattels' of such an one," is not law and should be overruled. In *Reg.* v. *Gallears* (2), where the prisoner was indicted for stealing "one ham of the goods and chattels of T. H.," it was objected for the prisoner, on the authority of *Reg.* v. *Cox* (3), that the description of the thing stolen was bad, as it might have been the ham of a wild animal, and therefore not the subject of larceny. The objection was overruled, and Pollock C.B. intimated a doubt as to the correctness of the ruling in *Reg.* v. *Cox.* (3) With regard to *Reg.* v. *Lonsdale* (4), it is to be observed that Pollock C.B. did not express a decided opinion that the objection to the indictment in that case was well founded. He said: "I am not prepared to accede to the objection at once, but I will reserve the point for the Court for Crown Cases Reserved." It became unnecessary for him to do so, as the prisoners were acquitted.

Avory, K.C., in reply. It is said that the authority of *Reg.* v.

(1) 2 East, P. C. 607.
(2) (1849) 1 Den. 501.
(3) 1 C. & K. 494.
(4) 4 F. & F. 56.

Cox (1) is to some extent undermined by an expression of doubt by Pollock C.B. in *Reg.* v. *Gallears*. (2) But if he did entertain such a doubt in 1849, when *Reg.* v. *Gallears* (2) was decided, it seems that fifteen years later he had changed his view, for in *Reg.* v. *Lonsdale* (3) it is clear that the inclination of his mind was the other way. If *Cox's Case* (1) and *Lonsdale's Case* (3) were well decided, then a fortiori is the indictment bad here. For the words "eggs" and "fowls" prima facie mean hens' eggs and domestic fowls, and therefore prima facie mean things which are the subject of larceny. It is the other way with pheasants' eggs, which prima facie are not the subject of larceny.

LORD ALVERSTONE C.J. This case raises a question of very great interest and importance with respect to the averments which it is necessary that an indictment should contain. Two persons were indicted, one a keeper named Stride, for stealing, and the other, a man named Millard, for receiving, a quantity of pheasants' eggs, and the main point which has to be decided is whether the indictment sufficiently avers that the eggs were the subject of larceny. But before dealing with that question I will dispose of a subordinate point that was made by Mr. Avory, on behalf of Millard, the receiver, that the count for receiving was bad, inasmuch as it did not allege that the eggs were chattels the stealing of which amounted to a felony either at common law or by virtue of the Larceny Act, 1861. What s. 91 of that Act says is that "whosoever shall receive any chattel . . . . the stealing . . . . whereof shall amount to a felony either at common law or by virtue of this Act, knowing the same to have been feloniously stolen . . . . shall be guilty of felony." And we are told by Mr. Avory, and I accept his statement, that since some unspecified date it has been the practice at the Central Criminal Court to insert in counts for receiving the words which it is complained are omitted here. I do not know when that practice was adopted. It has certainly not found its way into the recognized text-books, and I am satisfied from my own experience that a great many persons have been convicted

(1) 1 C. & K. 494. (2) 1 Den. 501.
(3) 4 F. & F. 56.

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of receiving stolen goods without those words being in the indictment. I think that the words are not necessary, and that there is no substance in that objection.

We now come to the main objection, which was taken to both counts of the indictment. It was contended that they are bad in that they do not allege that the pheasants' eggs in question had been reduced into the possession of Sir Walter Gilbey at the time of the stealing. It was not, indeed, disputed by counsel for the defendants that if a keeper is employed by his master to collect, either himself or by the under-keepers, the wild pheasants' eggs, and does collect them and have them in possession on behalf of his master, those eggs, if subsequently stolen, would be the subject of larceny; but it is said that the indictment ought to contain some expression to shew that they had been collected from the wild pheasants' nests. The question is whether the indictment as it stands is sufficient. The indictment charges that Stride "one thousand pheasants' eggs of the goods and chattels of and of and belonging to Sir Walter Gilbey feloniously did steal." Now I ask myself whether that averment does not, when read fairly, involve the necessity of those eggs having been already collected. In the first place, having regard to the large quantity of eggs alleged to have been stolen, no one reading the indictment could possibly think that the charge related to the taking of the eggs when in the nest; and, in the second place, in addition to the ordinary formal words "of the goods and chattels of," we find the words "and of and belonging to." It was said that the latter words were surplusage, as being merely another way of saying the same thing over again. But I do not take that view. I think that the words "and of and belonging to" may fairly mean that the eggs "had been collected by or on behalf of." Looking at the indictment as a whole, I should, apart from authority, be prepared to hold that it sufficiently charges that the eggs had been reduced into possession to satisfy the strictest rule of criminal pleading.

It has been argued that there are authorities to the contrary. The principal of these was *Rough's Case* (1) (the correctness of the report of which I have been able to verify by reference to the

(1) 2 East, P. C. 607.

original MS. of Buller J. from which the report is taken). The prisoner there was convicted of stealing "a pheasant value 10*s*. of the goods and chattels of H. S." There were no additional words in the indictment there. The judges were all agreed, "after much debate and difference of opinion," that the conviction was bad on the ground that "in cases of larceny of animals feræ naturæ the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add 'of the goods and chattels' of such an one." But that case does not appear to me to be an authority in favour of the present defendants. For there was no suggestion on the face of the indictment that the pheasant was other than a wild pheasant. It contained no statement that it was "of and belonging to H. S." or any other words to suggest that it had in fact been reduced into possession.

It seems to me that when you get a state of facts on the face of the indictment, as in the present case, which is only consistent with the articles, which are alleged to have been stolen, having been reduced into possession, it would be extremely artificial to say that that natural inference must be rejected because the articles under certain other circumstances might not be the subject of larceny. I think that if we were to take any other view of the present indictment than that which we do our decision would more properly "belong to a time when," as Lord Russell of Killowen observed in *Reg.* v. *Jameson* (1), "the right and justice and substance of the thing were sacrificed to the science of artificial statement."

But it was said that the principle of *Rough's Case* (2) was recognized in *Reg.* v. *Cox* (3), where an indictment for stealing "three eggs" was held by Tindal C.J. to be bad for not alleging that they were eggs of a kind that might be the subject of larceny. Speaking for myself, I am bound to say that, if at the present day a person were indicted for stealing eggs, I should be very slow to say that the indictment was insufficient because the eggs might conceivably have been "adders' eggs or some other species

(1) [1896] 2 Q. B. 425, at p. 431. (2) 2 East, P. C. 607.
(3) 1 C. & K. 494.

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of eggs which cannot be the subject of larceny." Whatever one may think of the decision in that case, one cannot approve of the reason. The next case that was referred to was *Reg.* v. *Gallears*. (1) There the indictment charged the stealing of "one ham of the value of 10*s*. of the goods and chattels of one G. H." It suggested that because a ham might be the ham of a wild animal the indictment was bad. Patteson J. said: "I do not understand the objection. Supposing it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcases of animals when dead, such as a boar's head." That illustrates the principle which I have endeavoured to point out applies to the indictment in the present case, namely, that things which are prima facie not the subject of larceny by reason of their being feræ naturæ are taken out of that category as soon as they cease to be in their natural state, and that it is sufficient if their artificial condition is made to appear in the indictment. Pollock C.B. in that case went further, and said that he entertained a doubt as to the correctness of the ruling in *Reg.* v. *Cox*. (2) Another case relied on for the defendants was *Tate's Case*. (3) The report is very scanty. All we are told is that the prisoners were "convicted of stealing five hens," and that, as "the indictment contained no averment that they were tame, Bolland B. arrested judgment." I very much doubt whether that was right. At all events, it does not go any further than *Rough's Case*. (4) Lastly, we were referred to *Reg.* v. *Lonsdale* (5), where an indictment for stealing "three fowls" was objected to as being ambiguous. Pollock C.B. said that, if necessary, he would reserve for the Court for Crown Cases Reserved the question whether the subject of the offence charged was sufficiently stated to be the subject of larceny. Those cases to my mind do not compel us to decide that the indictment in the present case insufficiently avers that the pheasants' eggs were so

(1) 1 Den. 501.
(2) 1 C. & K. 494.
(3) 1 Lewin, 234.
(4) 2 East, P. C. 607.
(5) 4 F. & F. 56.

reduced into possession as to be the subject of larceny. The objection to the indictment therefore fails, and the conviction must be affirmed. I desire to add that I dissent from the proposition contended for by Mr. Rawlinson that the taking of birds' eggs directly from the wild nests amounts to larceny. Whatever other offence such an act may involve it cannot, in my opinion, support a charge of larceny.

LAWRANCE J. I agree.

RIDLEY J. I am of the same opinion. I think that in so deciding we are in reality differing from *Rough's Case*. (1) But I think that we are justified in so doing upon the ground that that case was decided at a time when the technical rules of pleading required particularity and minuteness of statement which was out of all proportion to the merits of the case. Having regard to the altered conditions of the times, I do not think that the ruling in *Rough's Case* (1) is one which ought to be followed now. Even in that case it appears from his MS. note that Buller J. was at first inclined to think the indictment was sufficient. And he refers there to a case of *Fines* v. *Spencer* (2), where to a count in trover for a hawk alleging that the plaintiff "was possessed of the said hawk as of his own proper goods" an exception was taken that it ought to have alleged that the hawk was reclaimed or tame, and the Court were divided upon the question of the sufficiency of the count.

DARLING J. I am of the same opinion. The indictment alleged that the prisoners had respectively stolen and received certain pheasants' eggs of the goods and chattels of and of and belonging to Sir Walter Gilbey. The words "of the goods and chattels of," which may be called formal words, are sufficient for the purposes of an ordinary indictment for larceny or receiving where the subject-matter is an ordinary chattel, but are apparently not sufficient where the subject-matter of the charge is something which is feræ naturæ. But the additional words "of and belonging to" may, in my opinion, be fairly regarded as

(1) 2 East, P. C. 607. (2) (1571) Dyer, 306b.

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equivalent to a statement that the eggs in question belonged to Sir Walter Gilbey in the only way that they could belong to him, by having had something done to them sufficient to make them his property, and therefore the subject of larceny. The only case referred to in the course of the argument that caused me to entertain any doubt as to the sufficiency of the present indictment was *Rough's Case*. (1) But the indictment in that case, as appears clearly from the note in Buller J.'s manuscript book, averred nothing more than that the pheasant stolen was "of the goods and chattels of Hannah Stone." Had it contained the further words which we have here, I think the Court would have held the indictment to be good. Even as it stood, Buller J. says that at first he "inclined to think that the words 'of the goods and chattels of Hannah Stone' contained a sufficient allegation of property and that it was matter of evidence whether they were so or not," though ultimately he agreed with the other judges that the indictment was insufficient. With regard to *Cox's Case* (2), I need say no more than that it has never been regarded as a case of great authority, and after to-day it will probably be regarded as of even less authority than it was before.

CHANNELL J. I agree. I had at first some doubt whether the question of the sufficiency of the indictment was not concluded by *Rough's Case*. (1) But on consideration I agree that that case is distinguishable, for the reasons that have been given.

Conviction affirmed.

Solicitors for the Crown: *Watson & Everitt, Norwich.*
Solicitors for Stride: *Osborn & Osborn.*
Solicitors for Millard: *Wontner & Sons.*

(1) 2 East, P. C. 607. (2) 1 C. & K. 494.

J. F. C.

[IN THE COURT OF APPEAL.]

C A.
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Dec. 12, 13, 16;
1908
Jan. 23.

MARY FORSTER *v.* ELVET COLLIERY COMPANY, LIMITED AND OTHERS.

J. E. QUIN *v.* THE SAME.

R. SEED *v.* THE SAME.

M. E. MORGAN *v.* THE SAME.

Covenant—Compensation for Subsidence—Lease—Deed of Covenant—Owners for Time being—Covenant running with the Land—Non-existent Person—Benefit of Covenant—Heirs and Assigns of Covenantee—Covenantee not a Party—Real Property Act, 1845 (8 & 9 *Vict. c.* 106), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 58, *sub-s.* 1.

By a lease of January, 1887, the owners of minerals, but not of the surface, demised the coal under a large area to C. for thirty years, and C. covenanted with the lessors, "and as separate covenants with other the owners or owner, occupiers or occupier for the time being of the said lands . . . . to pay to the said lessors and other the covenantees or the covenantee compensation for all or any damage" occasioned by the working of the coal demised. C. died in September, 1887, and in October, 1896, the lease was assigned to a colliery company, who worked the coal till 1906, when a serious subsidence took place. The devisees and trustees of a surface owner, who was living at the date of the lease, and other surface owners, who had acquired their title since that date, brought actions against the colliery company, who were in liquidation, and the trustees and executors of C.'s will, claiming damages for subsidence by virtue of the covenant:—

Held, that the covenant was one "respecting any tenements or hereditaments" within s. 5 of the Real Property Act, 1845, the benefit of which, so far as it necessarily affected the value of the land, ran with the land, though the owners of the surface were not parties to the lease; that the covenant with the "owners for the time being" included owners in existence at the date of the lease, with whose "heirs and assigns" it must be deemed, as it related to land, to have been made, by virtue of the Conveyancing and Law of Property Act, 1881, s. 58, sub-s. 1, and consequently that it enured for the benefit of the then owners' heirs and assigns, and therefore for the benefit of all the plaintiffs, who were entitled to sue C.'s trustees and executors for damages.

Kelsey v. *Dodd*, (1881) 52 L. J. (Ch.) 34, discussed and distinguished.

APPEALS from judgments of Ridley J. at the Durham Assizes in June, 1907, sitting without a jury, which all raised practically the same question as to the construction of a covenant in a mining lease the point being whether the covenant by the

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lessee to pay compensation for damage caused by subsidence, was a covenant running with the land which could be enforced for the benefit of the plaintiffs as "heirs and assigns" of surface owners.

By a lease of January 27, 1887, made between the Ecclesiastical Commissioners for England of the one part, and Thomas Crawford (therein called the said lessee, "which expression is to include also his executors administrators and assigns unless such construction be excluded by the sense or the context") of the other part, the seams of coal lying under an area of some 973 acres of Crossgate Moor, in the county of Durham, were demised to Thomas Crawford for a term of thirty years from September 28, 1884, at the rents and royalties therein mentioned; and, as the Ecclesiastical Commissioners were not the owners of the whole of the surface of the area comprised in the lease, the lessee covenanted (so far as material for the question at issue) as follows: "And the said lessee hereby further covenants with the said lessors and as separate covenants with other the owners or owner occupiers or occupier for the time being of the said lands hereinbefore described or any part thereof or of any building now standing or hereafter during the continuance of the said demise to be erected thereon . . . . that the said lessee shall and will from time to time pay to the said lessors and other the covenantees or the covenantee compensation either annual or otherwise for all or any of the damage done or occasioned by the said lessee in or by reason of the winning or working of the mines or seams of coal hereby demised or any part thereof or the exercise of any of the powers or liberties hereinafter contained."

Thomas Crawford, the lessee, died in September, 1887, having by his will appointed executors, and having devised the "Elvet Colliery"—part of the area included in the lease—and the residue of his estate to trustees, upon trust to raise thereout certain moneys and to hold the residue for the benefit of his daughters.

The trustees carried on and worked the Elvet Colliery until October, 1896, when, with the consent of the Ecclesiastical Commissioners, the lease of January, 1887, was assigned to the

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Elvet Colliery Company, Limited, who entered into the usual covenant to indemnify the trustees against the payment of the rents under the said lease, and against the breach of any of the covenants and conditions therein contained. The company continued to work the coal demised until it went into liquidation in July, 1907.

In January, 1906, a serious subsidence extending over a large area took place, causing considerable damage to buildings and erections on the surface, with the result that some thirty persons made claims for compensation against the company. In November, 1906, a further subsidence took place, and further claims were made for compensation by the surface owners.

On January 16, 1907, the first of the above-mentioned actions was commenced, the plaintiffs being the trustees and devisees of the will of one John Forster, who was an owner of a portion of the surface of the land demised prior to and at the date of the said lease of January 27, 1887, and had died subsequently to the said lease.

On February 6, 1907, the other three actions were commenced, the plaintiffs in these actions being owners of portions of the surface of the land demised who had acquired their titles respectively since the date of the said lease of January 27, 1887.

All four actions were brought against the Elvet Colliery Company, Limited, and the present trustees and executors of the will of the said Thomas Crawford; and all claimed an injunction to restrain the colliery company from continuing to work the minerals to the injury of the plaintiffs, and full compensation for damages already caused to the respective plaintiffs' lands and buildings.

The actions were tried before Ridley J. at the Durham Assizes on June 27 and 28, 1907, sitting without a jury, who ordered judgment to be entered for the plaintiffs against all the defendants for damages, to be ascertained by reference.

The trustees and executors of Thomas Crawford appealed.

The appeal was heard on December 12, 13, and 16.

Tindal Atkinson, K.C., and *Compston*, for the appellants. These plaintiffs, none of whom were owners of the surface at the

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date of the lease, are not in a position to sue on this covenant. Under the old law no one could sue on a covenant who was not mentioned as a party to the deed, and this still holds good except so far as it has been altered by s. 5 of the Real Property Act, 1845 (8 & 9 Vict. c. 106); but that section only applies to covenants running with the land. This is merely a personal covenant, and is not a covenant with regard to real property at all. If the surface and the minerals had been one reversion, the case might have been different, but in this case the surface and the minerals are owned by different people. The plaintiffs do not claim under the Ecclesiastical Commissioners at all. Sect. 5 therefore does not apply. Further, a covenant with the owners and occupiers for the time being is bad as regards future owners, and on that ground also the plaintiffs are disentitled. *Kelsey* v. *Dodd* (1) is an authority in the appellants' favour on both points.

Scott Fox, K.C., and *Simey*, for Forster's trustees, the plaintiffs in the first action. The intention of the parties was that the benefit of this covenant should be conferred on the land of the surface owners in their hands, and this is a covenant which physically relates to the land and enhances the value of the surface; it is therefore a covenant the benefit of which runs with the land, and is within s. 5 of the Real Property Act, 1845: *Rogers* v. *Hosegood* (2); Smith's Leading Cases, 11th ed. vol. 1, p. 76, and cases there cited.

[FARWELL L.J. Is this a covenant with any definite person at all?]

It is a covenant with the existing owners and their assigns. It may be that the covenant covers too much, but a covenant, for instance, with A., B., C., and D., of whom D. was an alien, would not be bad as regards A., B., and C. This covenant must be approached ut res magis valeat quam pereat. The intention is clear, and the words are reasonably capable of expressing that intention; therefore they must be so construed as to give effect to the intention. The covenant is good as to surface owners existing at the date of the lease; it is a covenant "relating to land," and it is deemed to be made with the covenantee, his heirs and assigns: Conveyancing and Law of Property Act, 1881

(1) 52 L. J. (Ch.) 34. (2) [1900] 2 Ch. 388.

(44 & 45 Vict. c. 41), s. 58, sub-s. 1; *Lougher* v. *Williams* (1); *The Prior's Case* (2), cited in *Spencer's Case*. (3)

A very similar covenant to the present was held in *Norval* v. *Pascoe* (4) to run with the land; and in *Martyn* v. *Williams* (5) a covenant to repair was held to be assignable, as it directly touched the thing demised. [*Lord Hastings* v. *North Eastern Ry. Co.* (6) was also cited.]

This covenant was entered into with existing owners at the time it was made, and it was intended for the benefit of the surface of the land; it is therefore a covenant "respecting any tenements or hereditaments," and the fact that the existing owner is not named is rendered immaterial by s. 5 of the Real Property Act, 1845. It is clearly a covenant that affects the value of the land. If the claim is made qua owner, or qua occupier, then it is a claim "respecting" the land which can be enforced. A person a stranger to the land except through the covenant can get relief: *Sharp* v. *Waterhouse* (7), where a covenant to supply S. with pure water was held to run with the land. [Leake on Contracts, 4th ed. p. 142, was also cited.]

This covenant, therefore, notwithstanding its somewhat too wide language, was a good covenant with Forster as an owner of the surface at the date of the lease, and it was a covenant in its nature running with the land, thus enuring for the benefit of the then owners' heirs and assigns.

Manisty, K.C., and *Meynell*, for the plaintiffs in the other three actions, adopted the argument already addressed to the Court on behalf of Forster's trustees. The assigns of surface owners, who were owners of the surface at the date of the lease (which is the case of the other three plaintiffs), are practically in the same position as the devisees and executors of a surface owner alive at the date of the lease, and as "assigns" can claim the benefit of this covenant. As to enforcing a claim for compensation for subsidence, they referred to *Aspden* v. *Seddon*. (8)

(1) (1673) 2 Lev. 92.
(2) (1368) Co. Litt. 385a; 1 Roll. Ab. 520, 522.
(3) (1582) 5 Rep. 16; 1 Smith, L.C. 11th ed. vol. 1, p. 59.
(4) (1864) 34 L. J. (Ch.) 82.
(5) (1857) 26 L. J. (Ex.) 117.
(6) [1898] 2 Ch. 674.
(7) (1857) 7 E. & B. 816.
(8) (1876) 1 Ex. D. 496.

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Tindal Atkinson, K.C., in reply. The main question appears to be, is this a covenant that runs with the land, because unless it does none of these actions can succeed. The principles that apply to grantor and grantee do not apply to the case of lessor and lessee. A covenant between lessor and lessee, which involves something being done on land other than that demised, does not run with the land, and here the minerals only, not the surface, were demised: *Gower* v. *Postmaster-General.* (1)

[FARWELL L.J. This case cannot be regarded as one between lessor and lessee.]

The lessee covenants with the lessor and the owners of the surface for the time being, but the assignee of the lessor would not be able to sue for damages under this covenant: *Dewar* v. *Goodman.* (2) The collateral character of this covenant is fatal to both the benefit and burden alike: from its very nature it is one that does not run with the land; it is in the widest terms, and covers every kind of damage, e.g., a horse in the stable or furniture in a house. It does not add to the value of the land; it provides for compensation for damage for letting down the surface, and does not increase the original market value of the surface.

The Real Property Act, s. 5, cannot apply to a mere personal covenant—a mere obligation to pay a sum of money to be ascertained by reference to arbitration; it does not enable a covenant of this kind to be made with non-existing persons, and on this point *Kelsey* v. *Dodd* (3) is clear, and in the appellants' favour.

Cur. adv. vult.

1908. Jan. 23. COZENS-HARDY M.R. The plaintiffs in these four actions claim as owners of surface land which has been injured by reason of mineral workings in coal strata demised by a lease of January 28, 1887, from the Ecclesiastical Commissioners for England to Thomas Crawford.

The present appellants, the defendants in all four actions, are the executors of Thomas Crawford. The minerals demised are under a large area of land containing 973 acres. The lessors

(1) (1887) 57 L. T. 527.
(2) [1907] 1 K. B. 612.
(3) 52 L. J. (Ch.) 34, at p. 39.

apparently owned no part of the surface, although they had power to grant in connection with mineral leases certain surface rights. The plaintiffs claim the benefit of a covenant which, so far as is material, is as follows. [His Lordship read the covenant, and continued:—] The word "lessee" is by the definition at the beginning of the lease to include also "his executors, administrators and assigns, unless such construction be excluded by the sense or the context." And by s. 58 of the Conveyancing Act, 1881, words of limitation are to be read into the covenant, assuming it to be a covenant "relating to land." Now, under the old law, it is settled that the owner of the surface, not being mentioned as a party to the deed, could not have sued on the covenant. But, having regard to s. 5 of 8 & 9 Vict. c. 106, this difficulty is removed, assuming the covenant to be one "respecting any tenements or hereditaments." I think these words mean that the covenant must be one which runs with the land. The question for our decision, therefore, is whether the executors and trustees of a surface owner, which is Forster's case, or the assigns of a surface owner, which is the case of the other three plaintiffs, can sue upon the covenants. In my opinion they can. It is old law that in cases not between lessor and lessee the benefit of a covenant will pass if and in so far as it necessarily affects the value of the land, in this sense, that the owner of the land would get more for his land by reason of the covenant being attached to and annexed to it. I need only refer to the *The Prior's Case* (1) and *Rogers* v. *Hosegood* (2), where the whole law applicable to cases of this nature is elaborately discussed. I see no reason why the covenant to pay compensation for damage caused by the subsidence of the surface should not be a covenant to which this principle applies. The analogy of a covenant to insure against fire, which has been held to be a covenant which runs with the land as between lessor and lessee—*Vernon* v. *Smith* (3)—seems to be rather close. The real difficulty which I have felt is in disentangling from the covenant words which in law can have no operation or effect. The covenant with the occupier or occupiers

(1) Co. Litt. 385a; 1 Roll. Ab. 520, 523.

(2 [1900] 2 Ch. 388.

(3) (1821) 5 B. & Al. 1.

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for the time being would, I think, plainly be bad. If the covenant, in so far as owners are concerned, means that a fresh obligation is to arise towards each successive owner by reason of his ownership, whether he does or does not derive a title through the original owners, the covenant would to that extent also be bad. But the owners "for the time being" include the owners at the date of the deed. And I think the better view is to construe the covenant as made with Forster's testator and his heirs, in which case there seems no reason to doubt that his executors and trustees can sue upon it, although, if the trustees, and executors were different persons, it would be the trustees, and not the executors, who would have to sue. This reasoning seems to shew that there is no real difference between Forster's case and the case of the other plaintiffs. If the benefit of the covenant runs with the land, the grantees or assigns of the surface owners at the date of the lease can claim the benefit of those covenants and sue upon them. For these reasons I think the judgments appealed against are correct, and the appeals must be dismissed with costs.

FLETCHER MOULTON L.J., after a short statement of the facts, continued:—The claim is not based on tort, but upon a covenant existing in the lease of 1887 to the effect that the lessee will from time to time pay compensation for all damage to these superjacent lands done or occasioned by the lessee (which word is defined to include his assigns) in winning the seams of coal. The fact of damage having been caused by such workings is not in dispute. The sole question in issue is whether the plaintiffs are entitled to bring an action upon this covenant, not being named as parties to such indenture of lease.

So far as is material for the question at issue, the covenant in question runs as follows. [The Lord Justice read the covenant, and continued:—] The meaning and object of this covenant is to my mind clear. The parties to the lease intended thereby that the lessee should covenant directly and separately with each present or future owner or occupier of the superjacent lands, or any part of the same, to pay compensation for any damage done to those lands by mining operations under the lease. But the lease was

of course an indenture, and by common law no person who is not named as a party to the indenture can sue on the covenants therein contained. The claim of the plaintiffs would therefore clearly be unsustainable but for the provisions of s. 5 of the Real Property Act, 1845, which altered the common law by enacting that under an indenture executed after October 1, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof is not named a party to such indenture, and the first question to decide in the present case is as to the meaning and effect of this enactment.

This section was considered by Sir George Jessel, when Master of the Rolls, in the case of *Kelsey* v. *Dodd* (1), and he held that the effect of the enactment is solely to get rid of the objection which would arise from a man not being made a party to the indenture, but that it does not enable a covenant to be made with a non-existing party, that is to say, with a person who could not have been named as a party to the indenture. It does not enable persons to covenant in an indenture with non-existing persons any more than they could so covenant before the Act. I am not aware that this decision has ever been questioned, and on a careful consideration of the language of the section I am of opinion that it was correct. It follows, therefore, that the object of the parties, as I have above described it, could not be carried out by the insertion of any covenant. It was not competent for them thus to covenant separately and directly with future owners or occupiers of the lands in question. But, although the covenant is therefore inoperative so far as regards non-existing persons, namely, the future owners and occupiers of the lands in question, I can see no objection to it so far as it is a covenant with the then owners or occupiers of those lands, and I hold that, so far as these persons are concerned, the covenant was valid and enforceable against the lessee.

It is true that none of the plaintiffs in these actions were either owners or occupiers of any portion of these superjacent lands at the date of the lease. But the plaintiffs are successors in title of the then owners of portions of such lands by reason of

(1) 52 L. J. (Ch.) 34, at p. 39.

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being their assignees, and they urge that s. 58, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, applies to such a covenant as we have in this case, and that it must accordingly be deemed to have been made with the covenantee, his heirs and assigns. In other words, they say that, although the intention of the parties may have been to make a separate and direct covenant with each future owner, the fact that such a covenant would not be effectual does not prevent the present plaintiffs from claiming under the covenant made with their predecessors in title, who were owners of the lands at the date of the lease, and with whom, therefore, the lessee could and did effectually covenant.

Fletcher Moulton L.J.

This must depend on whether the covenant in question is a covenant running with the land, and it is this part of the case which has given me most difficulty. I can find no previous decision which affords much guidance. The effect of the covenant is to make the lessee pay compensation in respect of tortious acts with which he may have had nothing to do, for which he is not directly responsible, and of which he did not in any wise authorize the performance when he assigned the lease, and it binds him to permit such compensation to be assessed by a particular tribunal if required. There is much in all this which supports the view that the covenant is a personal covenant, not directly relating to the land, but intended by the parties to be a mere personal covenant by the lessee with the present or future proprietor, although the subject-matter is no doubt incidental to his proprietorship. But, although I have had some doubts on the matter, I have come to the conclusion that the principles which have guided the Courts in previous decisions on the question whether covenants run with the land compel us to hold that this covenant runs with the land. It relates solely to the land itself, and is not open to the objection which has so often been held fatal, namely, that it refers to acts to be done on other lands. It is clearly a covenant beneficial to the owner of the land as such, and tends to increase the value of such ownership. Indeed, considering the great doubts which at times have existed as to whether provisions such as are found in this lease authorize the lessee to let down superjacent land, the value

of such a covenant on the part of a solvent lessee might represent much of the selling value of the land. I am therefore of opinion that it runs with the land, and that the plaintiffs are entitled to sue upon it in virtue of their being successors in title to the owners of the land at the date of the lease.

There are slight differences in the position of the plaintiffs in the four several actions before us, but those differences do not in any way affect the above grounds of my decision, and I am therefore of opinion that the plaintiffs in each of the four actions are entitled to succeed, and that all these appeals must be dismissed with costs.

FARWELL L.J. The difficulty in this case is created by the phraseology of the covenants in the indenture of 1887. The property referred to in that deed originally belonged to the Dean and Chapter of Durham. The minerals beneath it subsequently and at the date of the indenture became and were vested in the Ecclesiastical Commissioners, and the surface at the same time belonged in part to the dean and chapter, and in part to persons to whom they had sold or let. Under these circumstances the Ecclesiastical Commissioners, by indenture of January 27, 1887, made between themselves of the one part and Thomas Crawford of the other part, demised the minerals under 973 acres or thereabouts to Crawford, and he entered into the covenants read by the Master of the Rolls. This indenture is a deed with a double aspect—as between the parties thereto it is a lease, but as between Crawford and the covenantees it is a deed of covenant; and the present question is between the latter only, so that no question of lessor and lessee, or parcel of the demise or the like, arises. But the covenantees are not made parties to the indenture, and the old rule of law that no one can sue on a covenant in an indenture who is not mentioned as a party to it —*Berkeley* v. *Hardy* (1)—still holds good, except so far as it has been altered by the Real Property Act, 1845, s. 5.

On the construction of this Act, I am of opinion that it applies only to covenants that run with the land: the Act is one for the amendment of the law of real property; the words "respecting

(1) (1826) 5 B. & C. 355.

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any tenements or hereditaments" are as apt to describe a covenant running with the land as is the usual phrase "relating to the land," and they occur in connection with the provision that an immediate estate or interest in land may be taken by a person not a party to an indenture. I do not think that they can be confined to cases where the indenture purports to convey to a person not a party, as well as to certain covenants with him, for this would render the words nugatory, as the covenants, being ex hypothesi annexed to the estate on which the statute operates so as to make it pass, would pass with it; but they do not extend to covenants in gross.

I am further of opinion that the benefit of these covenants as between the present plaintiffs and the present defendants in all the actions does run with the land. They certainly fulfil the first requisite—namely, they are "such as per se and not merely from collateral circumstances affect the value of the land": *Mayor, &c., of Congleton* v. *Pattison*. (1) There is nothing in the fact that the covenant sounds in damages to prevent it from so running—see *The Prior's Case* (2), where it was said that, "the remedie by covenant doth runne with the land to give dammages to the partie grieved"; see, too, *The Co-parcener's Case* (3); and all the covenants for title and quiet enjoyment sound in damages and run with the land. If the covenant here had been to leave supports for the surface, there could be no doubt: it would be at least as much for the benefit of the land as the covenant in *Rogers* v. *Hosegood* (4) not to build on land opposite a residence more than one building; and in case of breach damages would have been recoverable either in lieu of or in addition to any remedy by injunction.

The difficulty arises in respect of the second requisite, that the covenant must be made with a covenantee who has an interest in the land to which the covenant relates. The covenant here is "with the lessors and as separate covenants with other the owner or owners occupier or occupiers for the time being of the lands hereinbefore described." Now, the lessors are the mineral

(1) (1808) 10 East, 130, 138.
(2) Co. Litt. 385a; 1 Roll. Ab. 520, 522.
(3) (1368) 42 Edw. III., 3, 14; Co. Litt. 385a.
(4) [1900] 2 Ch. 388.

owners, but the covenantees are the surface owners or occupiers: the case, therefore, is not the same as *Kelsey* v. *Dodd* (1), where the covenant was with two persons who were the owners in fee, "their heirs and assigns and separately with the owners or owner for the time being of the C estate"; and Sir George Jessel held that the latter phrase was used in contrast to "owner" at the date of the deed and their heirs and assigns, and must therefore mean the persons who should be owners in the future from time to time as and when any breach of the covenant might occur. In the present case the lessors of the minerals and the owners of the surface are different persons. In my opinion, therefore, the owners for the time being mean, primarily at any rate, the owners at the date of the deed; and by s. 58, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, the covenant is made with them, their heirs and assigns. If any other owner not claiming as owner at that date, or as heir or assign of such owner, were to sue, the dictum of Sir George Jessel would apply to him. Some difficulty is created by the addition of the words "occupier or occupiers"; this is used in contradistinction to owner, and the Conveyancing and Law of Property Act, 1881, would therefore read into the covenant "his or their executors, administrators or assigns" instead of heirs and assigns. Such a covenant could not run with the land, but I do not think that this can affect the right of the owners, as it has not been suggested that the covenants are with owners and occupiers jointly. The plaintiffs in the first action are the devisees of an owner at the date of the deed, and in the other actions are purchasers claiming through such owners, and their title to sue is, in my opinion, clear. I agree that the appeals fail.

Appeals dismissed.

Solicitors: *Van Sandau & Co., for Belk, Cochrane & Belk, Middlesbrough; Dangerfield & Blythe, for T. & W. G. Maddison, Durham; Worthington, Evans, Dauney & Co., for Jones & Burrell, Durham.*

(1) 52 L. J. (Ch.) 34.

W. C. D.

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Jan. 23.

[IN THE COURT OF APPEAL.]

WADDLE, APPELLANT *v.* SUNDERLAND UNION, RESPONDENTS.

Poor-rate—Rateable Value—Deduction—Expense necessary to command Rent—Licensed Premises—Compensation Charge—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Parochial Assessments Act*, 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 1.

In estimating the rateable value of fully-licensed premises the amount of the annual charge imposed in respect of the premises under s. 3 of the Licensing Act, 1904, cannot be deducted, the charge not being an expense necessary to maintain the premises in a state to command the rent thereof within s. 1 of the Parochial Assessments Act, 1836:—

So *held*, affirming judgment of Divisional Court ([1906] 2 K. B. 899).

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Ridley J. and Darling J.) (1) upon a case stated by quarter sessions for the county of Durham in an appeal by the appellant against a rate made for the relief of the poor by the overseers of the parish of Sunderland on October 27, 1905.

The facts stated in the case were as follows:—

The appellant was the owner, licence-holder and occupier of certain fully-licensed premises known as the Central Hotel, situated at 32, Bridge Street, Sunderland. By the rate the appellant was assessed as the occupier of the Central Hotel upon a gross value of 750*l.* and a rateable value of 625*l.*

The appellant appealed against the rate at quarter sessions on the following ground: That, in addition to the deduction of one-sixth heretofore deducted by the committee for repairs, insurance and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year, there should also be deducted the amount charged thereon under s. 3 of the Licensing Act, 1904, for the year 1905.

By the material portions of s. 3 of the Licensing Act, 1904, it is provided that—

(1) [1906] 2 K. B. 899.

"(1.) Quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act.

"(2.) Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose.

"(3.) Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

Under the Second Schedule a person, whose unexpired term does not exceed one year, may deduct a sum equal to 100 per cent. of the charge.

Sunderland being a county borough, the compensation authority under the Licensing Act, 1904, is by virtue of s. 8, sub-s. 2, of that Act "the whole body of justices acting in and for the borough."

The licence of the Central Hotel was renewed for the year 1905, and the maximum charge of 80*l.* under s. 3 of the Licensing Act, 1904, was imposed upon the appellant in respect thereof, which charge had been levied and paid.

It was admitted by the respondents that it would probably be necessary in Sunderland to impose for some years to come the maximum charge under the Act, and that, therefore, for the purpose of this case 80*l.* might be taken to be the probable average annual amount of that charge.

It was admitted by the appellant that the duty on the excise

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licence never has been treated as within the words of s. 1 of the Parochial Assessments Act, 1836. (1)

It was contended for the appellant that the payment of the charge was a condition of obtaining the excise licence; that, as the licence was taken into consideration in estimating the gross value of licensed premises, this charge came within the words of s. 1 of the Act of 1836 as being an expense necessary to maintain the hereditaments in a state to command the rent at which they might be reasonably expected to let from year to year; that, therefore, the probable average annual amount of this charge was by virtue of the provisions of s. 1 a deduction to be made from the gross value in order to arrive at the rateable value of these hereditaments.

It was contended for the respondents that the ability of the hereditaments to command the aforesaid rent as licensed premises depended, not on the taking out of the excise licence, but on the grant of the justices' certificate; that this charge, being levied and paid as part of the excise licence duty, was not an expense within s. 1 of the Act of 1836, but was an ordinary trade expense necessary to the exercise of the privilege acquired by the justices' certificate, and did not constitute a deduction directed by s. 1 to be made from the gross value; that the excise duty never had been treated as an expense necessary to maintain the hereditaments in a state to command the rent, or other than as an ordinary trade expense; that expenses necessary to maintain the hereditaments in a state to command the rent were expenses ejusdem generis with repairs and fire insurance, and were expenses for the maintenance of the premises themselves, which alone were capable of being maintained; and that the charges levied

(1) The Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1: "Be it enacted that . . . . no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent; . . . ."

under the provisions of the Licensing Act, 1904, were not for maintenance, but as an insurance against loss resulting from destruction.

The quarter sessions rejected the appellant's contention, and dismissed the appeal, subject to this case.

The question for the opinion of the Court was whether the quarter sessions were right in holding that this charge was not such an expense as to constitute a deduction from the gross value within s. 1 of the Parochial Assessments Act, 1836.

The Divisional Court answered the above question in the affirmative, and accordingly gave judgment for the respondents. (1)

Jan. 22, 23. *Macmorran, K.C.*, and *Mitchell-Innes*, for the appellant. Licensed premises are valued as such for rating purposes, i.e., at the enhanced value due to the existence of the licence: *Cartwright* v. *Sculcoates Union*. (2) A payment which is necessary in order to create that enhanced value is an expense within s. 1 of the Parochial Assessments Act, 1836. The compensation charge has to be paid with the duty on the excise licence, without which payment the excise licence will not be issued. The justices' certificate or licence would give no increased value to the premises, unless the excise licence were issued. Therefore the payment of the compensation charge is an expense necessary to maintain the premises in a state to command the rent.

The ejusdem generis doctrine cannot be applied to the provisions of the Parochial Assessments Act, 1836, s. 1, with regard to deductions, so as to limit the deductions mentioned in that section to expenses connected with the structural condition of the premises, because the subject-matters of assessment are not confined to corporeal hereditaments capable of structural repair, but have been held to include tithes and tithe commutation rent-charge: see *Reg.* v. *Goodchild*. (3) The judgment of Darling J. in the Court below is incompatible with the decision in that case.

(1) [1906] 2 K. B. 899, at p. 903.
(2) [1900] A. C. 150.
(3) (1858) 27 L. J. (M.C.) 233; E. B. & E. 1.

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Several cases shew that the ejusdem generis doctrine has not been applied to s. 1 of the Parochial Assessments Act, 1836, and that the expenses deductible under that section are not confined to expenses directly connected with the maintenance of the structural condition of the hereditament: see *Reg.* v. *Gainsborough Union* (1); *Reg.* v. *Smith* (2); *Newport Union* v. *Stead* (3); *Humphreys* v. *Blyther*. (4)

It is true that the duty on the excise licence has heretofore not been treated as a deduction within s. 1 of the Parochial Assessments Act, 1836. That is because that duty, being an expense which the tenant knew that he would have to bear, would be taken into consideration by him in the rent which he would be ready to give; but the compensation charge in a case like the present is in the nature of a landlord's charge, because the tenant may deduct it from the rent: see Licensing Act, 1904, s. 3, sub-ss. 1, 2, 3, 4, and Scheds. I. and II. The provision that the charge shall be collected with and as part of the excise duty is mere machinery of collection. It is a deduction from the profit of the hereditament receivable by the landlord; and it is an expense which must be incurred in order that the hereditament may continue to have the status of licensed premises, and therefore in a state to command an enhanced rent as such.

The judges in the Divisional Court relied on the argument that this charge was not imposed for the purposes of the particular hereditament, but in order to carry out a scheme for the reduction of the number of licensed houses; but the ultimate application of the charge is not the test—the question is whether, if it were not paid, the enhanced value of the premises as licensed premises would be maintained. The argument that the "other expenses" referred to in s. 1 of the Parochial Assessments Act, 1836, must be confined to expenses ejusdem generis with repairs and insurance, i.e., expenses necessary for the maintenance of the physical state of the premises, involves the suggestion that the same words must be construed in the case of a corporeal

(1) (1871) L. R. 7 Q. B. 64.
(2) (1885) 55 L. J. (M.C.) 49.
(3) [1907] 2 K. B. 460.
(4) (1878) Reported in Brown's Copyhold Enfranchisement Acts, 3rd ed. p. 474.

hereditament in a sense different from that in which they would be construed in relation to an incorporeal hereditament, which, it is submitted, would be contrary to general principle. The case of *Reg.* v. *Smith* (1) is a very strong authority in favour of the appellant, because the expenses there allowed by way of deduction could not, strictly speaking, be said to be expenses necessary for the physical maintenance of the hereditament. [They also cited *Reg.* v. *Vange* (2); *Rex* v. *Bradford* (3); *Dodds* v. *South Shields Union*. (4)]

E. Tindal Atkinson, *K.C.*, and *E. Shortt*, for the respondents. The charge imposed by the Licensing Act, 1904, s. 3, is not an expense which can be deducted from the gross value of the hereditament under the Parochial Assessments Act, 1836, s. 1. It is not a charge on the premises, but merely a charge payable by way of addition to the duty which, by the Excise Acts, is payable by the licensed person before he can carry on the trade in intoxicating liquors upon the premises in respect of which he has obtained the justices' licence. It is the justices' licence, and not the excise licence, which causes the enhancement of the value of the premises. The excise licence is issued automatically when the justices' licence has been procured: see s. 17 of the Alehouse Act, 1828 (9 Geo. 4, c. 61). As soon as the latter licence has been procured the premises are capable of being let at an enhanced rent as being licensed premises. If the licensee did not take out the excise licence, that would not prevent a transfer, and a renewal of the licence in a subsequent year. It is impossible, therefore, to say that the payment of the compensation charge under the Licensing Act, 1904, is an expense necessary to maintain the hereditament in a state to command the rent.

Furthermore, it is contended that in any case the charge is not one which comes within the fair meaning of the words "probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent" in s. 1 of the Parochial Assessments Act, 1836. Those words indicate expenses connected with the

(1) 55 L. J. (M.C.) 49.
(2) (1842) 3 Q. B. 242.
(3) (1815) 4 M. & S. 317.
(4) [1895] 2 Q. B. 133.

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maintenance of the physical state of the hereditament to be rated. The appellant must contend that it is sufficient, in order to bring the case within the words of the Parochial Assessments Act, 1836, s. 1, to shew that the payment of the charge in question is necessary to maintain the financial value as distinguished from the physical state of the premises. In *Reg.* v. *Goodchild* (1) the judges were compelled to apply the words of the Parochial Assessments Act, 1836, s. 1, to a subject-matter to which they were not in their natural sense applicable, to an incorporeal hereditament, namely, tithe rent-charge, and consequently they had to give a forced construction to them and apply them by way of analogy. But no such necessity arises in the case of a corporeal hereditament, and it is submitted that, in relation to such a hereditament, the words ought to receive their natural construction.

The mere fact that the charge paid by a licence-holder who is a tenant forms the subject of a deduction from the rent payable to the landlord is no ground for holding that the amount so deducted is an expense which may be deducted under s. 1 of the Parochial Assessments Act, 1836. The provision for collecting the charge as part of the excise duty is merely machinery of collection. It is in the nature of a personal tax on the landlord which is in the first instance collected from the tenant, like landlord's property tax. The mere fact that it constitutes a deduction from the profits derived from the premises by the landlord does not make it a proper subject of deduction under the Parochial Assessments Act, 1836: see per Blackburn J. in *Reg.* v. *Gainsborough* (2) and Buckley L.J. in *Newport Union* v. *Stead.* (3) This is not an expense incurred for any object relating to the licensed hereditament itself, but for a purpose relating to other premises. It is really a personal tax imposed on the landlord for the purpose of creating a fund for the compensation of those interested in premises of which the licence is not renewed, and it cannot be described as a charge on the rent of the premises, though it may affect the landlord's income.

(1) 27 L. J. (M.C.) 233; E. B. & E. 1.

(2) L. R. 7 Q. B. 64-68.

(3) [1907] 2 K. B. 460, at pp. 478, 479.

Probably the landlord would increase the rent of the licensed premises so as to cover it.

Mitchell-Innes, for the appellant, in reply.

VAUGHAN WILLIAMS L.J. In spite of the arguments which have been addressed to us, I cannot doubt that the principles relied upon by the appellant as to the application of the Parochial Assessments Act, 1836, are correct. Sect. 1 of that Act provides that no poor rate shall be of any force, "which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." I cannot myself doubt that, notwithstanding the use of the words defining the deductions from the rent at which the rateable hereditament might reasonably be expected to let from year to year, the words "other expenses," &c., may apply to expenses not ejusdem generis with "repairs and insurance," and that the words "necessary to maintain them in a state to command such rent" may include expenses which have no reference to maintenance in a physical condition to command the rent. Indeed, it is admitted that these words do so extend to analogous expenses in the case where the rateable hereditament is incorporeal: see *Reg.* v. *Goodchild* (1); *Reg.* v. *Smith* (2); and I myself have no doubt that, wherever the estimate of the net annual value of a rateable hereditament is based upon a condition not corporeal appertaining to the hereditament, such as a licence, or a canteen grant, one must, in making the estimate, deduct expenses necessary for the accrual of the condition. The favourable condition, if it be such that it is to be taken into consideration in the estimate of the net rent, must be taken into consideration subject to a deduction of the cost of the accrual of that condition; and, if I had been of opinion that the increased value consequent

(1) 27 L. J. (M.C.) 233; E. B. & E. 1. (2) 55 L. J. (M.C.) 49.

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upon the grant of the justices' licence did not become operative until the grant of the excise licence, and that the payment of the charge in question was by s. 3 of the Licensing Act, 1904, a condition precedent to the accrual of the value consequent upon the grant of the licence, I should have given judgment for the appellant. But, being of opinion that this hotel acquired its full value as a licensed house independently of the grant of the excise licence, which was essential to the realization of the increased value of the hereditament from being licensed in the trade of a licensed victualler, but not for the purpose of selling or letting the hereditament, I have come to the conclusion that the deduction claimed cannot be allowed, and that the decision of the King's Bench Division must be affirmed.

FARWELL L.J. I agree with the judgment delivered by the Lord Justice.

KENNEDY L.J. I agree in the conclusion arrived at by the other members of the Court, but I desire to add a few observations, for, although, so far as my view differs from that taken by Vaughan Williams L.J., I express it with profound respect for his opinion, and with diffidence as to the correctness of my own, still I think that I ought to state the opinion which I have formed on the questions raised by this case.

This is an appeal from the decision of three judges in the Divisional Court, and, further, though I do not desire to lay too much stress upon this, it is worthy of notice that their decision in this case was cited in the argument in the Court of Appeal in the case of *Newport Union* v. *Stead* (1), and was referred to, without any disapproval, by Buckley L.J. in his judgment (2) as affording an example, among others, of a payment which, although "necessarily payable by the owner," is "not the subject of deduction for purposes of rating." Speaking for myself, I feel bound to express my opinion that there is no colour at all for the contention that the decision of the Divisional Court was wrong. The charge in question is a charge imposed by the Legislature, not upon the premises, but upon the holder of the

(1) [1907] 2 K. B. 460. (2) [1907] 2 K. B. at p. 478.

licence. Sect. 3, sub-s. 1, of the Licensing Act, 1904, provides that "quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area," certain charges, the object being to provide a fund for the purpose of giving compensation in cases where licences are not renewed in consequence of the provisions of the Act. Then by Sched. I. the maximum amount of the charges to be paid is fixed, and it is provided by s. 3, sub-ss. 2, 3, that these charges shall be levied and paid together with and as part of the duties on the corresponding excise licence, and that licence-holders who are tenants, and who pay charges under the section, may make such deductions from their rent as are set out in the Second Schedule to the Act.

Now it is quite true that the strong inference which, as it seems to me, might, prima facie, be properly drawn from the fact that these charges are to be collected with and as part of the duty on the excise licence, which has never been treated as a subject-matter of deduction for rating purposes, is to some extent met by the fact that such charges, when paid by tenants, are ultimately recoverable by them from their landlords by way of deduction from the rent as provided by s. 3, sub-s. 3, of the Licensing Act, 1904. But I do not acquiesce in the argument that this is a complete answer to the inference which I have mentioned. The case of *Newport Union* v. *Stead* (1) shews that, in determining rateable value, the question is, not what is the net annual amount which the owner can put into his pocket, after discharging all necessary outgoings, but what is the rent at which the hereditament might reasonably be expected to let, deducting therefrom the items mentioned in the Parochial Assessments Act, 1836, s. 1. It does not appear to me to follow from the fact that the Legislature has provided, presumably because it thought such a provision to be in accordance with the justice of the case, that the charges imposed under the Licensing Act, 1904, should ultimately be borne by the landlord, that therefore they form a proper subject for deduction in

(1) [1907] 2 K. B. 460.

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assessing the value of the hereditament under the Parochial Assessments Act, 1836. It appears to me, with great respect for the argument of the learned counsel for the appellant, that the fallacy to a great extent involved in it is that it would almost follow from it that any sum made recoverable from the owner of premises by way of deduction from rent, as this charge is made by the Act here in question, would, from that very circumstance, be a subject for deduction for the purpose of arriving at the rateable value of the hereditament to be rated, whereas by the Parochial Assessments Act, 1836, the only deductions permissible are in respect of repairs, insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command such rent. Now, as Vaughan Williams L.J. has said—and I entirely concur in that—it is not necessary, in order to command the enhanced value attaching to the premises by reason of the licence, that this sum, which is to be levied as part of, as well as with, the duty on the excise licence, should be paid. But, further than that, even if it were necessary, I do not think that such a payment would fairly come within the words of s. 1 of the Parochial Assessments Act, 1836. After carefully considering the argument for the appellant, I have come to the conclusion that one ought not, for the purposes of this question, to throw out of consideration the natural meaning, as applicable to corporeal hereditaments, of the words "and other expenses, if any, necessary to maintain them in a state to command such rent," following as they do the specified items, "repairs" and "insurance." It does not seem to me that, because premises may be of a higher rateable value by reason of their being licensed premises, that is to say, because a certain class of persons would pay a higher rent for them by reason of the income derivable through carrying on a particular kind of business upon them, it therefore follows that a payment which has to be made in order that this business may be carried on is an expense which can, under the terms of the Parochial Assessments Act, 1836, s. 1, be properly deducted in arriving at the rateable value of the premises for the purposes of the poor rate. It is quite true that, in cases relating to a certain class of incorporeal hereditaments which, by reason of the terms used in legislation centuries old, had to

be treated as the subject of rating, namely, tithe rent-charges, the judges, for reasons which, I think, are sufficiently explained in their judgments, did go a long way in allowing deductions of a kind which could hardly in strictness be said to be "other expenses necessary to maintain" a hereditament "in a state to command such rent," but which they regarded as being analogous thereto. But I confess, speaking for myself, that I should, as at present advised, hesitate to accept finally the conclusion that, because they adopted that course in dealing with the difficulty which they felt in applying the terms of the Parochial Assessments Act, 1836, s. 1, to an incorporeal hereditament, it follows that in a case like the present, where the subject-matter to be dealt with is a corporeal hereditament, namely, licensed premises, and therefore the same difficulty does not arise, a similar course should be adopted, and a deduction allowed in respect of an expense which does not fairly and naturally come within the terms of the section as to the character of the deductions which may be made. It seems to me that the expense in question in the present case cannot be said in any sense to have been necessarily incurred in maintaining the premises, even in the sense in which, in the case of *Reg.* v. *Smith* (1), the charge there in question was said to be an expense necessary for the purpose of maintaining the hereditament; for in that case the deduction allowed was of an expense which might really be said to have been necessary for the maintenance of the essential value of the fishery itself. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Godden, Son & Holme, for Longden, Mann & Longden, Sunderland.*

Solicitors for respondents: *Johnson, Weatherall & Sturt, for J. G. Marshall, Sunderland.*

(1) 55 L. J. (M.C.) 49.

E. L.

C. A.
1908
Jan. 27.

[IN THE COURT OF APPEAL.]

GROH, APPELLANT; HESKETH, RESPONDENT.

Licensing Acts—Conditional Licence—Hours of opening—Application for occasional Licence—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 29.

The respondent was granted in 1906, under s. 4 of the Licensing Act, 1904, a licence in respect of certain premises for the period of two years upon the condition that the premises should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. During the currency of the licence the respondent applied to justices in petty sessions, under s. 29 of the Licensing Act, 1872, for an occasional licence exempting him from closing the premises on December 17, 1906, between the hours of 7 P.M. and 11 P.M. The justices granted the occasional licence asked for:—

Held (affirming the decision of a Divisional Court, [1907] 2 K. B. 232), that they had power to do so.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Darling J. and Phillimore J.) upon a case stated by justices for the Upper Division of the Lathe of Sutton-at-Hone, in the county of Kent. (1)

On December 7, 1906, the respondent appeared before the justices and applied to them under the provisions of s. 29 of the Licensing Act, 1872, to grant him a licence exempting him from closing certain licensed premises known as the North Pole, Dartford, in the county aforesaid, on December 17, 1906, between the hours of 7 and 11 in the evening.

The following facts were proved or admitted:—

The respondent was the managing director of Messrs. J. & E. Hall, Limited, engineers, of Dartford, and the holder of a six-day licence for the premises before mentioned.

The licence was granted by the licensing justices for the Upper Division of the Lathe of Sutton-at-Hone, at the general annual licensing meeting held on February 2, 1906, for the period of two years, upon the conditions that the premises in question should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. in the afternoon, and that the

(1) [1907] 2 K. B. 232.

respondent paid 50*l.*, the amount assessed as the monopoly value of the said premises.

The licence was granted for the convenience of the work-people in Messrs. Hall's and surrounding works, and the amount of 50*l.* was, with the consent of the justices, reduced by the confirming authority to 20*l.*

It was stated on behalf of the respondent that before the granting of the licence the premises had been habitually used for suppers, dinners, and other entertainments of the like kind. On these occasions no intoxicating liquors could be obtained from the respondent, and the practice was for those attending such suppers, &c., to either bring, or cause to be brought, to the North Pole, intoxicating liquors purchased elsewhere. It was proposed to continue the holding of these entertainments, and, with a view of avoiding the necessity for the practice above mentioned, which was considered objectionable, it was desired that the justices should grant an occasional licence under s. 29 of the Licensing Act, 1872 (1), in respect of December 17, 1906.

It was contended on behalf of the respondent that under s. 29 the justices had full power to grant the application.

On behalf of the appellant it was contended (*a*) that s. 29 did not apply to the licence in question, which had been granted under s. 4 of the Licensing Act, 1904 (2), inasmuch as s. 29 of

(1) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 29: "If any licensed victualler . . . . applies to the local authority of a licensing district for a licence exempting him from the provisions of this Act relating to closing of premises on any special occasion or occasions, it shall be lawful for such local authority, if in his discretion he thinks fit so to do, to grant to the applicant an occasional licence exempting him from the provisions of this Act relating to closing of premises during certain hours, and on the special occasion or occasions to be specified in the licence; and no licensed victualler . . . . to whom an occasional licence has been granted under this section shall be subject to any penalty for the contravention of the provisions of this Act relating to the closing of premises during the time to which his occasional licence extends, but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other provision of this or any other Act of Parliament."

(2) Licensing Act, 1904 (4 Edw. 7, c. 23), s. 4: "(2.) The justices, on the grant of a new on licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other

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the Act of 1872 applied only to those licensed premises which were subject to the provisions of that Act relating to the closing of premises, whereas the premises of the North Pole, although licensed, were not subject to those provisions, but were restricted to the two hours mentioned in the conditions attached to the licence; (*b*) that the justices, sitting in petty sessions, had no power to alter or vary in any way the conditions upon which the licence had been granted and the monopoly value assessed.

The justices overruled the contention of the appellant and granted the occasional licence asked for.

The question for the opinion of the Court was whether they were right in so doing.

The Divisional Court answered the above question in the affirmative, and dismissed the appeal.

Danckwerts, *K.C.*, and *George Elliott* (*Cecil Fitch* with them), for the appellant. The justices have no power under s. 29 of the Licensing Act, 1872, to grant an occasional licence to a licensee of premises in respect of which a conditional licence, such as that in the present case, has been granted under s. 4 of the Licensing Act, 1904, so as to dispense pro tanto with the condition attached to that licence. Under s. 4 of the Licensing Act, 1904, in the case of the grant of a new on licence, such conditions must be attached to the grant of the licence as the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed and the value of the same premises if they were not licensed. In this case the confirming authority assessed the monopoly value at 20*l*. That value was obviously fixed with reference to the profit which might be made in the

matters, as they think proper in the interests of the public . . . .

"(3.) The justices may, if they think fit, instead of granting a new on licence as an annual licence, grant the licence for a term not exceeding seven years . . . ."

"(5.) A licence granted for a term under this section may (without prejudice to any other provisions as to forfeiture) be forfeited, if any condition imposed under this section is not complied with, by order of a Court of summary jurisdiction made on complaint . . . ."

number of hours during which the house could be kept open for the sale of intoxicating liquors. It is clear from the statements in the case that it was in contemplation to apply for a series of occasional licences for these premises; and, if these can be granted, a much larger amount of profit may be made than that with reference to which the monopoly value was fixed.

[KENNEDY L.J. The same argument apparently would apply in the case of any occasional licence granted under s. 29 of the Licensing Act, 1872.]

Sect. 29 of the Act of 1872 provides that the licensee shall be exempted by an occasional licence granted under that section from the provisions of this Act relating to the closing of premises during the time to which his occasional licence extends, "but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other provision of this or any other Act of Parliament." By s. 4, sub-s. 5, of the Licensing Act, 1904, "a licence granted for a term under this section may (without prejudice to any other provisions as to forfeiture) be forfeited, if any condition imposed under this section is not complied with, by order of a Court of summary jurisdiction made on complaint." It cannot be that the effect of the legislation was meant to be that an occasional licence may be granted under s. 29 of the Licensing Act, 1872, when acting upon that licence would expose the licensee to a forfeiture of his licence under s. 4, sub-s. 5, of the Licensing Act, 1904. Under the Licensing Act, 1872, the closing hours, in respect of which the occasional licence under s. 29 operates, are not the same hours as those in respect of which the occasional licence in this case was granted. The occasional licence contemplated by s. 29 is one which exempts the licensee from the provisions of the Licensing Act, 1872, as amended by the Licensing Act, 1874, with regard to closing time. The hours in respect of which this occasional licence was granted are not prohibited hours under the Act of 1872. The occasional licence under s. 29 is to confer exemption from penalties for keeping the premises open during the hours prohibited by the statute. Here the prohibition is not created by the statute, but by the conditions

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of the licence. [They referred to the Licensing Act, 1874, ss. 3, 7.]

The respondent did not appear.

VAUGHAN WILLIAMS L.J. As regards the argument based on the suggestion that the monopoly value was assessed in this case with reference to the number of hours during which, under the conditions of the licence, the premises were allowed to be kept open for the sale of intoxicating liquors, it appears to me that precisely the same observation would apply to every occasional licence granted under the Licensing Act, 1872, s. 29. The question which is raised by the case is whether the justices were right in overruling the contention of the appellant and granting the occasional licence for which application was made. The Divisional Court, consisting of the Lord Chief Justice, Darling J. and Phillimore J., with some doubt on the part of the last-mentioned judge, upheld the view taken by the justices. I also think that the justices were perfectly right in doing what they did. I have read, and agree with, the judgment of the Lord Chief Justice. One of the considerations on which he relied had occurred to me independently—namely, that, upon the true construction of the words at the end of s. 29 of the Licensing Act, 1872, limiting the exemption from penalty conferred by an occasional licence under the section, they do not apply to penalties for keeping the house open beyond the hours during which it is allowed to be kept open by statute. In my opinion the meaning of those words is that, if there are any other provisions of the Act, or of any other Act, relating to the conduct of the business of the licensed premises, the exemption conferred by the occasional licence shall not apply to any penalties imposed by such provisions, but they have nothing to do with penalties in relation to keeping the house open during prohibited hours. I think that this appeal should be dismissed.

FARWELL L.J. I am of the same opinion. I only wish to add that, speaking for myself, even if the construction of the words of s. 29 had been other than that put upon them by Vaughan Williams L.J., I should have been disposed to think

that the justices might well grant the occasional licence asked for, if they thought it reasonable, leaving the question as to its effect to be determined on proceedings, if any such were subsequently taken, for forfeiture of the licensee's licence before a Court of summary jurisdiction under s. 4, sub-s. 5, of the Licensing Act, 1904. I cannot myself think that, in the exercise of their discretion, a Court of summary jurisdiction would forfeit the licence because the licensed premises had been kept open for a few hours under an occasional licence such as that which was granted in the present case.

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KENNEDY L.J. I agree entirely with the judgments pronounced by Vaughan Williams L.J. and by the Lord Chief Justice in the Divisional Court.

Appeal dismissed.

Solicitors for appellant: *Maitlands, Peckham & Co.*

E. L.

ANGLO-ALGERIAN STEAMSHIP COMPANY, LIMITED *v.* THE HOULDER LINE, LIMITED.

1907 *Dec.* 3, 18.

Negligence—Infringement of Public Right—Special and particular Damage—Negligent Navigation—Damage to Dock—Right of Public to enter Dock—Closing of Dock for Repairs—Harbours, Docks, and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33—*Alexandra (Newport and South Wales) Docks and Railway Act*, 1882 (45 *&* 46 *Vict. c. ccli.*).

By careless navigation the defendants damaged the gates of a certain dock owned by a dock company, so that it was found necessary to close the dock for several days for repairs.

The dock company's special Act incorporated s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, which provides that upon payment of the rates made payable by that and the special Act the dock shall be open to all persons for the shipping and unshipping of goods.

The plaintiffs' ship arrived outside the dock in order to take a cargo which was in the dock ready for her to load. Owing to the dock being closed, she was detained outside the dock gates for two days and a half. The plaintiffs claimed from the defendants damages for this detention:—

Held, that the negligent act of the defendants was too indirectly

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related to the plaintiffs' loss to constitute a good cause of action, and that the defendants were entitled to judgment.

Ricket v. *Directors, &c., of the Metropolitan Ry. Co.*, (1867) L. R. 2 H. L. 175, considered.

TRIAL of action before Walton J. without a jury.

The plaintiffs were the owners of the *Tangistan*, a steel screw steamship of 2393 tons net register and 350 feet in length, trading between Newport, Monmouthshire, and the Persian Gulf and India.

The defendants were the owners of the *Royston Grange*.

On March 28, 1906, at 5.40 A.M., the outer gates of the lock leading to Alexandra South Dock at Newport were damaged by the negligent navigation of the *Royston Grange*. Notwithstanding this damage to the gates the dock was open on March 29, 30 and 31; but for the purposes of repairing the damage it was found necessary to close the dock on April 1, and to keep it closed for several days.

On April 1, 1906, at 6.35 A.M., the *Tangistan* arrived outside Alexandra Dock, intending to take a cargo which was in the dock ready for her to load. On her arrival she found that the outer dock was closed. She was prevented from entering the dock until April 3, 1906, at 7.15 P.M.

The Alexandra South Dock was a private dock vested in the Alexandra (Newport and South Wales) Docks and Railway Company, and constructed and maintained under the Alexandra (Newport and South Wales) Docks and Railway Act, 1882 (45 & 46 Vict. c. ccli.). By s. 2 of that Act the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), is incorporated. By s. 33 of the last-named Act it is provided as follows: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

The plaintiffs claimed damages for two and a half days' detention. It was agreed that 80*l.* was a reasonable sum if the defendants were liable in the action.

Bailhache, for the plaintiffs. The question in this case is what duty, if any, the owners of a ship entering a dock owe to

the owners of ships which may subsequently enter or attempt to enter. In other words, what right have the owners of the latter vessels to enter the dock. That right is conferred by statute in the following way: The Alexandra (Newport and South Wales) Docks and Railway Act, 1882, under which the Alexandra South Dock was constructed, by s. 2 incorporates the Harbours, Docks, and Piers Clauses Act, 1847, which by s. 33 confers a right upon all persons who pay the proper rates to enter the dock. That right is either a private or a public right. If it is a private right the mere obstruction of it is an actionable wrong, and the plaintiffs need not allege or prove special damage: *Rose* v. *Groves* (1); *Lyon* v. *Fishmongers' Co.* (2); *W. H. Chaplin & Co.* v. *Westminster Corporation.* (3)

If it be a public right, then the plaintiffs, in order to recover, must prove special damage. The case is analogous to one in which the plaintiff suffers particular damage from an obstruction to a public highway: *Maynell* v. *Saltmarsh* (4); *Hart* v. *Basset* (5); *Iveson* v. *Moore* (6); *Rose* v. *Miles* (7); *Greasley* v. *Codling* (8); *Winterbottom* v. *Lord Derby* (9); *Beckett* v. *Midland Ry. Co.* (10); *Benjamin* v. *Storr* (11); *Fritz* v. *Hobson.* (12)

[WALTON J. referred to *Chichester* v. *Lethbridge* (13); *Hubert* v. *Groves* (14); *Barber* v. *Penley* (15); Addison on Torts, 8th ed. pp. 10-12.]

The detention for a period of two days and a half of a profit-earning chattel is sufficient special damage to entitle the plaintiffs to maintain this action.

Even if the only right of the plaintiffs is a contractual right between them and the dock company, interference with that right without lawful excuse gives a right of action: *Lumley* v. *Gye* (16); *Allen* v. *Flood* (17); *Cattle* v. *Stockton Waterworks*

(1) (1843) 5 Man. & G. 613.
(2) (1876) 1 App. Cas. 662.
(3) [1901] 2 Ch. 329.
(4) (1664) 1 Keb. 847.
(5) (1693) Sir T. Jones, 156.
(6) (1700) 1 Ld. Raym. 486; see Willes, p. 74, note (*a*).
(7) (1815) 4 M. & S. 101.
(8) (1824) 2 Bing. 263.
(9) (1867) L. R. 2 Ex. 316.
(10) (1867) L. R. 3 C. P. 82.
(11) (1874) L. R. 9 C. P. 400.
(12) (1880) 14 Ch. D. 542.
(13) (1738) Willes, 71.
(14) (1794) 1 Esp. 148.
(15) [1893] 2 Ch. 447
(16) (1853) 2 E. & B. 216.
(17) [1898] A. C. 1.

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Co. (1); and, even if they were mere invitees or licensees of the dock company, a third person owes a duty not to interfere with their licence: *Corby* v. *Hill.* (2)

Scrutton, K.C., and *Dawson Miller*, for the defendants. The suggested analogy between the right of the plaintiffs to enter the Alexandra Dock and the right of a member of the public to pass and repass along a public highway is not a true analogy. The right of the plaintiffs is a contractual right available against the dock company to enter their dock upon payment of the rates due, and is more analogous to the right of a consignor of goods against a common carrier to have his goods safely carried upon payment of a reasonable charge. There is no duty towards the world at large to abstain from injuring the dock company's premises any more than there is a duty to the world at large to abstain from injuring a carrier's van. A person who by negligent driving injures the van of a carrier is not liable to all persons who may be intending to forward goods, and whose goods may be delayed in consequence of the injury to the van. So in this case, whatever may be the duty of the defendants to the owners of ships in close proximity to their own, they owe no duty to those owners to abstain from injuring the dock, and still less do they owe any such duty to the owners of ships out at sea who may be intending on their arrival to enter the dock. Injury to the property of a person gives a right of action to the owner, but not to all who may have beneficial contracts relating to the property: *Simpson* v. *Thomson* (3); *Cattle* v. *Stockton Waterworks Co.* (1)

If the defendants owed any duty to the plaintiffs not to damage the dock, it was not the legal consequence of their breach of duty that the plaintiffs' vessel was delayed. That was due to the action of the dock company, who for their own convenience allowed the dock to remain open for three days after the accident, and did not close it until the day on which the plaintiffs' ship happened to arrive.

Assuming the right of the plaintiffs to enter the dock to be analogous to the right of a member of the public to pass along

(1) (1875) L. R. 10 Q. B. 453. (2) (1858) 4 C. B. (N.S.) 556.
(3) (1877) 3 App. Cas. 279.

a public highway, an obstruction to this right is not actionable unless some damage is done either to the person of the plaintiff or to his property—for example, his horse or his cart. Mere delay owing to the obstruction is not sufficient to establish a cause of action: *Winterbottom* v. *Lord Derby* (1); neither is mere loss of profit owing to the obstruction: *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (2), overruling *Wilkes* v. *Hungerford Market Co.* (3) Lord Chelmsford L.C., in *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (2), held that the claimant for compensation under the Lands Clauses Consolidation Act, 1845, for interruption to his business owing to the works of the railway company had no right to compensation, because the acts of the company, if unauthorized by statute, would have given him no right of action at common law.

Bailhache, in reply. It has never yet been doubted that an obstruction to a public highway gives a cause of action to any person who suffers special or particular damage other and greater than that which is suffered by the public generally. Loss of profit may constitute such special and particular damage: *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (2) has not been taken to overrule all the previous authorities on this point. If it had done so, the subsequent cases of *Beckett* v. *Midland Ry. Co.* (4), *Benjamin* v. *Storr* (5), and *Fritz* v. *Hobson* (6) must have been decided differently.

Cur. adv. vult.

Dec. 18. WALTON J., after stating the facts, gave judgment as follows:—The argument in support of the plaintiffs' case was that, under s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, they had a right to take their vessel into the dock, that they were obstructed in the exercise of this right by the negligent act of the defendants, and that they suffered thereby actual loss and damage. The plaintiffs contend that the case is not distinguishable in principle from that of an obstruction of a public highway by which a particular person has suffered actual damage peculiar to himself.

(1) L. R. 2 Ex. 316.
(2) L. R. 2 H. L. 175.
(3) (1835) 2 Bing. N. C. 281.
(4) L. R. 3 C. P. 82.
(5) L. R. 9 C. P. 400
(6) 14 Ch. D. 542.

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Walton J.

For the defendants it was contended that this analogy was false, and that the rules of law applicable in the case of an obstruction of a public highway did not apply in the present case; and, further, they contended that, even if the acts complained of amounted to something equivalent to an obstruction of a highway by the defendants, the plaintiffs had no cause of action. In support of the latter contention the defendants relied mainly upon the judgment of Lord Chelmsford in *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (1) The question decided in that case was as to the right of the plaintiff to compensation under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. Different considerations, of course, apply in a case where compensation is claimed under the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act and in an action on the case for damages. But as compensation cannot be recovered under those Acts where no action at law would lie for the damage in respect of which the compensation is claimed if the act causing such damage had been committed without the authority of Parliament, the question as to the right of action at common law may arise in compensation cases; and it did arise and was considered, both in the Exchequer Chamber and in the House of Lords in the case of *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (1) Lord Chelmsford, in that case, certainly held, adopting and approving the reasoning of Erle C.J. in the Exchequer Chamber (2), that the plaintiff Ricket could not have recovered damages at law for the obstruction and injury of which he complained, and in respect of which he claimed compensation. The true meaning and effect of what Lord Chelmsford said on this point is, I venture to think, made quite clear by reference to the reasoning of Erle C.J., which Lord Chelmsford followed, and which is to be found in 5 Best and Smith, at pp. 159 to 162. It there appears that the grounds upon which the Chief Justice held that the plaintiff could not have recovered in an action at law on the case were, that he had not been, in the language of the Chief Justice, "obstructed in the exercise of any right vested in him"; that the damage of which he complained was damage to his business in consequence

(1) L. R. 2 H. L. 175, at p. 186. (2) (1865) 5 B. & S. 156.

of other persons being obstructed in the exercise of their rights on the public highway in question; and that this damage was too remote. The Chief Justice pointed out that, in all the reported cases in which damage had been recovered for the obstruction of a highway except *Wilkes* v. *Hungerford Market Co.* (1), "the plaintiff"—I am now quoting the words of Erle C.J. (2)—"was exercising his right of way, and the defendant obstructed that exercise and caused particular damage thereby directly and immediately to the plaintiff." He thought that the decision in *Wilkes* v. *Hungerford Market Co.* (1) was wrong, and in this opinion Lord Chelmsford agreed with Erle C.J. The short ground of the decision on this point in *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* was, as Lord Chelmsford says (3), that the damage was too remote. It seems to me that this decision would have no bearing in a case in which the owner of a ship had been obstructed in the exercise of his right to navigate his ship in a public navigable channel, that is to say, a highway for ships, and who had thereby suffered actual loss and damage by the detention of his ship. For reasons which I am about to state, it is not necessary for me to decide whether and upon what conditions in such a case an action could be successfully maintained. Having regard, however, to the course which the argument took at the trial, I think it right to say that I am not prepared to hold that in such a case an action would not lie. I do not think that there is anything in *Ricket* v. *Directors, &c., of the Metropolitan Ry. Co.* (3) to impair the authority of *Rose* v. *Miles.* (4) Assuming, however, that such an action would lie, it does not follow that the plaintiffs are entitled to succeed in the present case. The defendants contend that there is no true analogy between the two cases; and it appears to me that to speak of the plaintiffs' right to have their vessel admitted into the dock upon payment of the dock dues as if it were similar in its legal character and incidents to the right to navigate a vessel along a public channel is misleading. The dock company carry on a business which is, amongst other things, that of providing certain accommodation for ships in their dock and rendering

(1) 2 Bing. N. C. 281.
(2) 5 B. & S., at p. 160.
(3) L. R. 2 H. L. 175, 188.
(4) 4 M. & S. 101.

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certain services to shipowners in and about the docking and undocking and the loading and discharging of their ships. They enjoy, for this purpose, certain statutory rights and privileges, and are under a statutory obligation to allow all persons to use the docks for the purposes of loading or discharging vessels upon payment of the dock dues. They are not allowed to grant any preference by affording the accommodation of their dock to certain persons and refusing it to others. But this obligation does not, in my opinion, make the entrance to the dock a public highway. The obligation of the dock company is similar to that of the common carrier who must carry goods offered to him for carriage, or of the innkeeper who must receive guests. If, by the tortious act of a wrong-doer, the inn is rendered unfit for the reception of guests, and, in consequence of this, some person is prevented from obtaining accommodation as a guest at the inn, and is thereby put to expense, is there any authority for saying that such a person could recover damages from the wrong-doer? I have been unable to find any. The tortious act in the present case, as in the hypothetical case of the inn, is very different in its relation to the plaintiffs and their loss from the tortious act of obstructing a highway by which a person desiring to use the highway is directly prevented from exercising his right. The wrongful act of the defendants in the present case was their negligence by which the dock gates were injured. In consequence of this it became necessary to repair the gates, and, for the purpose of repairing them, it became necessary to close the dock. Whilst the dock was closed the plaintiffs' vessel arrived, and she was detained outside the dock for two and a half days waiting to be admitted, and the plaintiffs thereby suffered the loss of which they complain. In my judgment the negligence of the defendants was too indirectly related to the alleged interference with the plaintiffs' right and to their loss to constitute a good cause of action by the plaintiffs against the defendants. Upon these grounds I think that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Downing, Handcock & Co.*

Solicitors for defendants: *William A. Crump & Son.*

W. H. G.

CLARK *v.* BALM, HILL & CO.

1908
Feb. 13.

Bill of Sale—Incorporated Company—Debenture—Non-registration—Debenture of Foreign Company—Bills of Sale Acts, 1878 (41 *&* 42 *Vict. c.* 31), *and* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 17.

Debentures of a limited liability company registered in Guernsey creating a charge on floating real and personal property of the company are exempted from the operation of the Bills of Sale Acts, 1878 and 1882, by s. 17 of the latter Act.

Interpleader issue tried before Phillimore J. without a jury.

The Buhlmann Incandescent Syndicate, Limited, was registered in August, 1903, in Guernsey as a limited liability company, with a capital of 20,000*l.* in 1*l.* shares.

By the memorandum and articles of association the syndicate had power to borrow, and to secure the payment of the amount borrowed by the issue of debentures, and accordingly in January, 1904, the syndicate created and issued a series of mortgage debentures for 1700*l.* Each debenture purported to charge the undertaking and all the property of the syndicate, whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, and was issued subject to the conditions indorsed thereon.

Among the conditions it was provided that the principal moneys secured by the debentures should become payable immediately upon a judgment being obtained against the syndicate, and, further, that after the principal moneys thereby secured had become payable, the persons holding a majority of the debentures might appoint a receiver, and that the receiver should have power to take possession of the property charged by the debentures.

In January, 1906, a judgment having been obtained against the syndicate, a majority of the debenture-holders appointed the present plaintiff, G. W. Clark, to be receiver of the undertaking and property of the syndicate charged by the debentures, and he accordingly took possession of the assets of the syndicate, all of which were situate in London.

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In July, 1906, the defendants Balm, Hill & Co. recovered judgment against the syndicate for 193*l.*, and levied execution on the machinery, plant, chattels and goods of the syndicate, which were then in the possession of the plaintiff as receiver for the debenture-holders. An interpleader issue was ordered, in which the receiver was to be plaintiff and the execution creditors defendants, which now came on for trial.

It was admitted that the debentures were issued in England, and were charged upon property in England; that they were not registered in Guernsey, and that the law of Guernsey contains no provisions as to the registration of debentures or charges created by a limited liability company.

Gore-Browne, K.C. (*H. E. Wright* with him), for the plaintiff. The question is whether these debentures are or are not bills of sale. Had they been the debentures of an English company, and registered in England, they would come under the special exemption of the Bills of Sale Acts, but it is suggested that, as they are the debentures of a foreign company incorporated in Guernsey, the exemption does not apply, and that the debentures are void for want of registration as bills of sale. By the Bills of Sale Acts bills of sale are required to be registered; and by s. 17 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company." In *Read* v. *Joannon* (1) it was held that the Bills of Sale Act, 1878, did not apply to the debentures of an incorporated company, but, even if it did, the effect of s. 17 of the Act of 1882 rendered it unnecessary that such a debenture should be registered as a bill of sale. No limitation of the expression "incorporated company" was there given. In *Levy* v. *Abercorris Slate and Slab Co.* (2) the meaning of a debenture is explained, and the words "or other incorporated company" are given a wide meaning. In *In re Standard Manufacturing Co.* (3) it was held that the words were not to be construed as limited to

(1) (1890) 25 Q. B. D. 300. (2) (1887) 37 Ch. D. 260.
(3) [1891] 1 Ch. 627.

companies ejusdem generis with "a mortgage or loan company." In *Great Northern Ry. Co.* v. *Coal Co-operative Society* (1) it was held that s. 17 did not apply to the debentures created by industrial and provident societies.

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"Company" includes a foreign company: *In re Irrigation Co. of France* (2); *De Beers Consolidated Mines* v. *Howe* (3); *General Steam Navigation Co.* v. *Guillou.* (4)

Foote, K.C. (*Trickett* with him), for the defendants. *Read* v. *Joannon* (5) only decided that the debentures of incorporated companies were not within the Bills of Sale Acts. It is no authority here, where the question is whether the syndicate was an incorporated company within the meaning of s. 17. It is evident by implication from s. 17 that the Legislature intended that the debentures of all companies other than those specially mentioned should fall within the Bills of Sale Acts and require registration as such. In *Great Northern Ry. Co.* v. *Coal Co-operative Society* (6) Vaughan Williams J. points out that the question whether the exceptions of s. 17 apply to the debentures of all companies is deliberately left open by the Court of Appeal in *In re Standard Manufacturing Co.* (7), and he declined to extend the exemption. The object of s. 17 was that the debentures of all incorporated companies which were not required to be registered under the Companies Acts should be registered as bills of sale. Floating charges were first required to be registered by s. 14 of the Companies Act, 1900.

PHILLIMORE J. I think the plaintiff ought to succeed. The question is whether he is precluded from recovering on the interpleader issue, because the debentures in pursuance of which he seized and entered into possession of this property ought to be deemed to be within one or other of the Bills of Sale Acts, 1878 and 1882, and ought, therefore, to be registered as bills of sale. I take it, after the discussion before me, that I am right in coming to the conclusion that the cases of *Read* v. *Joannon* (5) and *In re Standard Manufacturing Co.* (7) decided that all debentures

(1) [1896] 1 Ch. 187.
(2) (1871) L. R. 6 Ch. 176.
(3) [1906] A. C. 455.
(4) (1843) 11 M. & W. 877.
(5) 25 Q. B. D. 300.
(6) [1896] 1 Ch. 187, at p. 196.
(7) [1891] 1 Ch. 627.

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of incorporated bodies are exempt from the Act of 1878; and, with regard to what is meant by debentures, I can only refer to the judgment of Chitty J. in the case of *Levy* v. *Abercorris Slate and Slab Co.* (1), and in the sense that he decided there I have no doubt that these are debentures. If that is so, I think there is a little error in the judgment of Vaughan Williams J. in the case of *Great Northern Ry. Co.* v. *Coal Co-operative Society* (2), where he referred to the judgment of the Court of Appeal: "It seems to me, therefore, that in the judgment delivered by Bowen L.J., the question whether the Bills of Sale Acts apply to other companies, that is, companies in the case of which no provision has been made for registration, is deliberately left open." No companies in respect of their debentures are within the Bills of Sale Act of 1878; and, that being the case, do any companies come in respect of their debentures within the Act of 1882? The only reason for supposing that they do is the pains taken by s. 17 of the Act of 1882 to put some, if not all, of them out of the Act; and it is a curious inversion of the intention of the Legislature to infer from that section that companies are brought within it. I think the wiser view is to hold that s. 17, passed at a time when some at least of these decisions had not been given, was put in ad majorem cautelam to make it clear that, at any rate, the debentures which that section enumerated should not come within the Act. But, assuming that s. 17 does by implication shew that the Act of 1882 intended to include debentures other than those excepted by s. 17, are not these debentures excepted by s. 17? It is said that they are not excepted, because only the debentures of those companies are excepted which keep a register of their mortgages. There is no doubt that the decision of the Court of Appeal in *In re Standard Manufacturing Co.* (3), is for this purpose, limited to these companies, and there is also no doubt that Vaughan Williams J. thought that there were corporate bodies which did not come within that decision, and that he was inclined to make that class of corporate bodies as large as possible, and in fact to treat all corporate bodies which do not keep a register as excepted

(1) 37 Ch. D. 260.
(2) [1896] 1 Ch. 187, at p. 196.
(3) [1891] 1 Ch. 627.

from s. 17. But as we are dealing with Acts of Parliament and cases which were decided before the statute of 1900, which for the first time requires a really efficient register of all classes of debentures to be kept, it is but a slight reason for drawing a distinction between debentures and debentures that the corporate body creating the debentures was or was not bound to keep the imperfect register provided by the Companies Act, 1862, or the Companies Clauses Act, 1845. It is the more curious that stress should be laid upon that register, because both the cases in which that stress has been laid or that reservation made are cases where the particular debentures would not have been registered because the register under these early Acts was only for specific charges, and these were floating debentures. I myself think that, though the Court of Appeal rightly guarded itself against deciding more than it need do in *In re Standard Manufacturing Co.* (1), I ought to follow and am bound by *Read* v. *Joannon* (2), which is wider in its terms; and I must say that the reasoning of Wills J. in that case commends itself to my mind.

Then another point was taken and must be dealt with separately. Is this an incorporated company within the meaning of s. 17, or does s. 17 mean a company incorporated either by Act of Parliament, or possibly by charter, or more naturally under the Companies Act of 1862 and its amending Acts, and nothing else? Vaughan Williams J. has decided that the expression "incorporated company" in s. 17 does not mean a corporation in the sense of a municipal corporation or a chartered corporation, and that it does not mean such a society as a friendly society. That judgment concludes these points. But if the body is a company and if it is an incorporated company, and if there is nothing to bring it within the mischief of the statute, why should I hesitate to hold it within s. 17, especially if the company, though not a company incorporated according to the law of the United Kingdom, is nevertheless a company incorporated according to the laws in force in one portion of the British Empire under the sanction of the common sovereign? I think I ought not to restrict these words, and that I ought to hold that this debenture

(1) [1891] 1 Ch. 627. (2) 25 Q. B. D. 300.

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issued by this company, duly incorporated according to the laws of Guernsey, is within the excepted clause of s. 17 of the Act of 1882, and that therefore there ought to be judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Ashurst, Morris, Crisp & Co.*
Solicitors for defendant: *Tetley, Tree & Tetley.*

A. P. P. K.

C. A.

1907

Nov. 22.

[IN THE COURT OF APPEAL.]

ROBSON *v.* BIGGAR.

Practice—Appeal—"Criminal Cause or Matter"—Distress—Bailiff—Costs and Charges—Agreement for Extra Remuneration—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93)—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47.

The Court of Appeal has no jurisdiction to hear an appeal from a decision of a Divisional Court upon a case stated by justices as to a complaint under s. 2 of the Distress (Costs) Act, 1817, against a certificated bailiff for unlawfully retaining certain charges exceeding those allowed by statute when employed to make a distress for rent for a sum not exceeding 20*l.*, the proceeding before justices being a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873.

APPEAL from the decision of a Divisional Court upon a case stated by justices for the county of Northumberland. (1)

The respondent, a certificated bailiff, had been summoned to answer a complaint made by the appellant under s. 2 of the Distress (Costs) Act, 1817, that the respondent, being employed by the appellant to make a distress upon the goods and chattels of one Cowen for a sum of 17*l.*, being arrears of rent due by Cowen to the appellant, unlawfully retained certain charges exceeding those allowed by statute, viz., a sum of 17*s.* for alleged commission. The printed form of warrant or authority to distrain brought by the respondent to the appellant contained

(1) [1907] 1 K. B. 690.

a printed form of consent to the respondent's deducting 5 per cent. as commission over and above the statutory costs allowed on the amount recovered; the document was signed by the appellant. After making the distress, the respondent handed to the appellant's agent the sum of 16*l.* 3*s.* as the amount recovered, retaining 17*s.* commission deducted by him in accordance with the appellant's consent contained in the warrant. The justices dismissed the complaint.

The Divisional Court (Lord Alverstone C.J. and Ridley J., Darling J. dissenting) held that the respondent was not prohibited by the Distress (Costs) Act, 1817, or the Law of Distress Amendment Act, 1888, or the rules thereunder, from making a special agreement with the appellant for extra remuneration beyond the costs and charges allowed by those Acts. The appellant appealed.

Adair Roche, for the respondent. There is a preliminary objection to the hearing of this appeal. The decision of the justices was a decision in a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, from which no appeal lies. It is true that the complaint in form asked for no fixed sum of money, but under s. 2 of the Act of 1817 the penalty which must have been inflicted, had the decision been against the respondent, was treble the amount of the moneys unlawfully taken. That was a penalty which could not have been recovered by action, but only by proceedings before justices; nothing beyond the actual amount of the moneys retained could have been recovered in a civil action. The fact that the penalty goes to the complainant does not prevent the proceeding being a criminal matter. The latter part of s. 2, which, in case of non-payment, authorized imprisonment in default of sufficient distress, was repealed by the Summary Jurisdiction Act, 1884; but s. 5 of the last-named Act provides that where, by virtue of such a repeal, a statute authorizing the infliction by justices of a penalty or fine provides no method for its recovery, ss. 19 and 21 of the Summary Jurisdiction Act, 1848, as amended by s. 21 of the Summary Jurisdiction Act, 1879, are to apply to the recovery of such penalty or fine; the effect of these sections is that this is a proceeding

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which may end in imprisonment in default of distress. The usual test to apply is whether the order is one which may, not which must, end in imprisonment: per Lord Esher M.R. in *Seaman* v. *Burley* (1); another test is whether the penalty is in the nature of a punishment. A third test may be found in the procedure adopted, as in the case of an assault, which may be treated as a tort or as a crime; in the present case the appellant might have sued for the 17*s.* in the county court, but preferred to try to recover the penalty of treble that amount before the justices. [He also referred to *Lumsden* v. *Burnett.* (2)]

Forster Boulton, for the appellant. The proper test to apply is whether the proceedings before justices could end in imprisonment, and it is submitted that in the present case the proceedings could not so end. The amount recoverable was a civil debt within the meaning of s. 6 of the Summary Jurisdiction Act, 1879, which provides that where under any Act a sum of money claimed to be due is recoverable on complaint to a Court of summary jurisdiction, and not on information, it is to be deemed a civil debt. The present proceedings were not commenced by information, but by complaint.

[BIGHAM J. Sect. 6 only refers to "a sum of money claimed to be due," not to proceedings which must result, if successful, in the infliction of a penalty.]

In *Reg.* v. *Kerswill* (3) Charles J. said that the mere statement in an Act of Parliament that a sum was recoverable as a penalty did not turn the non-payment of what was merely a debt into an offence.

VAUGHAN WILLIAMS L.J. I feel great difficulty in saying that this proceeding against the respondent bailiff is not one which might have ended in imprisonment. The appellant has chosen to institute proceedings for a penalty measured by three times the amount of the moneys alleged to have been unlawfully retained, and I think that the facts shew that the proceeding was a criminal one; it might end in imprisonment, and in certain

(1) [1896] 2 Q. B 344. (2) [1898] 2 Q. B. 177.
(3) [1895] 1 Q. B. 1, at p. 7.

circumstances would so end. The preliminary objection, therefore, succeeds, and the appeal must be dismissed.

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SIR GORELL BARNES, PRESIDENT, and BIGHAM J. concurred.

Appeal dismissed.

Solicitor for appellant: *R. Scott Hopper, Whitley Bay, Northumberland.*

Solicitors for respondent: *Maples, Teesdale & Co., for Bramwell & Bell, North Shields.*

W. J. B.

In re P. MACFADYEN & CO.
Ex parte VIZIANAGARAM COMPANY, LIMITED.

1908 *Jan.* 20.

Bankruptcy—Firm Bankrupt in England and in India—English Trustee and Indian Official Assignee—English Creditors and Indian Creditors—Agreement for pooling and distributing the Assets—Sanction of Court—Jurisdiction.

Where a firm is bankrupt in England and abroad, and has English and foreign assets and English and foreign creditors, the Court has jurisdiction to sanction an agreement between the trustee in bankruptcy in England and the official assignee abroad for pooling all the assets and distributing them rateably amongst the English and foreign creditors, notwithstanding that the Bankruptcy Act, 1883, contains no express provisions authorizing such a scheme.

THIS was an application to test the validity of an agreement which the trustee proposed to enter into under these circumstances.

Patrick Macfadyen, until his death on October 20, 1906, carried on in co-partnership with Sir G. Arbuthnot and J. M. Young the business of merchants and bankers in London under the style of P. Macfadyen & Co., and at Madras under the style of Arbuthnot & Co. On October 22, 1906, a bankruptcy petition was presented against P. Macfadyen & Co. by creditors in London, grounded on an act of bankruptcy committed on the previous October 20, and on October 27, 1906, a receiving order

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P. MACFADYEN & Co., *In re.* VIZIANAGARAM COMPANY, LIMITED, *Ex parte.*

was made against that firm in London; adjudication followed, and on November 7, 1906, a Mr. Cooper was appointed the trustee in the London bankruptcy. On November 17, 1906, an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration in bankruptcy of Patrick Macfadyen's estate, and on November 25 these proceedings were ordered to be consolidated with the proceedings under the bankruptcy of the firm of P. Macfadyen & Co. Meanwhile, on October 22, 1906, the Insolvent Court at Madras, on the petition of the surviving partners of the firm of Arbuthnot & Co., made an order under the Indian Insolvent Debtors Act, 1848 (11 & 12 Vict. c. 21), s. 7, vesting all the joint and separate estate of that firm in the official assignee at Madras.

There were 1036 creditors in England of the firm of P. Macfadyen & Co., and the liabilities of that firm were about 400,000*l*. There were about 7000 creditors of the firm of Arbuthnot & Co. in India, mostly natives, and the liability of that firm exceeded one million sterling.

Negotiations ensued between Mr. Cooper and the official assignee at Madras with the view of entering into a working arrangement on the footing that the two firms were one and the same firm carrying on one and the same business, and eventually the following scheme was propounded:—

"1. The insolvency proceedings in Madras and the bankruptcy proceedings in England shall continue concurrently, each following the ordinary course of administration and procedure according to the local enactments and this agreement.

"2. Arbuthnot & Co. and P. Macfadyen & Co. are in fact and shall be treated as one and the same firm carrying on one and the same business.

"3. All creditors whose proofs shall have been admitted by the official assignee or established in Madras, or admitted by the trustee or established in England, shall be entitled to share rateably.

"4. The official assignee shall from time to time furnish the trustee with a statement or statements certified by him of all debts admitted by him or established in Madras, and the trustee shall in like manner from time to time furnish the official

assignee with a like statement or statements certified by him of all debts admitted by him or established in England, and both of them shall thereupon be entitled and bound to admit all such debts as debts duly proved also in the bankruptcy in England and in the insolvency in Madras respectively.

"5. The official assignee will distribute all dividends to creditors on the books of Arbuthnot & Co. and the trustee to those on the books of P. Macfadyen & Co., but, in order to ensure a rateable distribution of all assets among the creditors, neither the official assignee nor the trustee shall distribute a dividend without first ascertaining that the other of them has in his hands, available for dividend, sufficient to enable him to distribute a dividend at the like rate. Eventually the official assignee or the trustee, as the case may require, shall remit to the other such balance as may be necessary in order to ensure such rateable distribution of dividend as above mentioned. The assets above referred to are the partnership assets and any surplus assets arising from the separate estates of any of the partners.

"6. The provisions of clauses 4 and 5 shall apply also to the separate estates of Sir George Gough Arbuthnot and John Montgomery Young.

"7. All the assets of the firm or of the said Sir George Gough Arbuthnot and John Montgomery Young situate in England shall be recovered and realized by the trustee, all those in India by the official assignee.

"8. All assets of the late P. Macfadyen wherever situate shall be realized by the English trustee.

"9. This agreement is subject to the approval of the Court both in England and in Madras."

Meanwhile Mr. Cooper applied, under s. 118 of the Bankruptcy Act, 1883, to the Insolvent Court at Madras for an order—(1.) that the Madras Court and the official assignee should act in aid of and be auxiliary to the trustee in bankruptcy in England; and (2.) that the official assignee should hold the balance of the estate and effects of the insolvents in Madras for and on behalf of the trustee in bankruptcy in England, and from time to time pay over the same to him or otherwise deal with it according to his direction; and on April 3, 1907, the Madras Court made an order

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granting the first part of Mr. Cooper's application, but dismissed the second part of his application.

On May 14, 1907, Mr. Cooper applied to the Bankruptcy Court in London for directions as to—(1.) whether he should appeal from the order of the Madras Court made on April 3 ; and (2.) whether he was legally entitled to enter into the proposed scheme with the official assignee at Madras, and the Court, whilst leaving the question of appealing to the discretion of the trustee, saw no objection to the proposed scheme, but ordered that the trustee should have regard to any directions to be given at a general meeting of the creditors to be called pursuant to s. 89 of the Bankruptcy Act, 1883.

On October 21, 1907, the Insolvent Court at Madras, on the application of the official assignee, confirmed the proposed scheme. Meanwhile, having regard to the large number of the creditors in India, it was found quite impracticable to hold a representative general meeting of the creditors, and the question arose whether Mr. Cooper could legally enter into the scheme. Thereupon the Vizianagaram Company, Limited, who were large creditors of P. Macfadyen & Co. and had lodged a proof in the English bankruptcy, with the view of testing the validity of the scheme, applied to the Court for a declaration that Mr. Cooper was not legally entitled to enter into the proposed working agreement, and for an order restraining him from so doing. The motion now came on for hearing, and there was a cross-motion by the trustee that he might be at liberty to enter into the agreement.

S. G. Lushington, for the company. There are no provisions in the Bankruptcy Act, 1883, or in the Indian Act, which is an Imperial statute, that authorize such a scheme as this. Under the Act of 1883 all the assets at home or abroad vest in the English trustee, who is bound under the Act to distribute them only amongst the creditors who prove in the English bankruptcy, and has no power to remit any part of them to the official assignee for the benefit of Indian creditors who have not proved here. The company are not hostile, but object to any arrangement overriding their strict rights under the Act against the firm of

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Macfadyen & Co., and desire the opinion of the Court upon the validity of the agreement.

Gore-Browne, K.C., and *Hansell*, for the trustee. Admitting that there is no express jurisdiction either under the Act of 1883 or the Indian Act, it is submitted that nevertheless the Court has an inherent general jurisdiction to sanction a scheme which is manifestly for the benefit of all the creditors, as it facilitates the realization of the estates and tends to avoid delay and expensive litigation between the official assignee in India and the trustee in bankruptcy in England.

BIGHAM J. I will make an order authorizing Mr. Cooper to enter into the proposed agreement. I consider it is clearly a proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested. I think both parties were entitled to come to the Court and ask for its protection, which the order I now make will give them. The costs of all parties to this application will come out of the estate.

Solicitors: *Freshfields; Stibbard, Gibson & Co.*

H. L. F.

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Dec. 17.

BROMLEY CORPORATION *v.* CHESHIRE.

Sewer—Adjoining Houses—Single Private Drain—Entry by Local Authority upon Ground of one House—Examination of Drain—Notice to Occupier of Adjoining House—Recovery of apportioned Part of Expenses of relaying Drain—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41.

The drainage of two adjoining houses was carried into a public sewer by a single private drain. The sanitary inspector of the appellants (the local authority), on the application of the occupier of one of the houses, applied the smoke test to the drains of that house and found that something was wrong. The appellants subsequently served a notice on the respondent, the owner of the adjoining house, requiring him, in conjunction with the owners of the house where the smoke test had been applied, to take up and relay the drain within one month. The work not having been done, the appellants did it and apportioned the costs in respect of the respondent's house at 23*l.* 9*s.* 2*d.* The appellants had given no notice under the first part of s. 41 of the Public Health Act, 1875, to the occupier of the respondent's house of their intention to enter the house where they applied the smoke test and examine the drain, and no evidence of emergency was given. The respondent did not pay the 23*l.* 9*s.* 2*d.*

On a complaint preferred by the appellants against the respondent that the 23*l.* 9*s.* 2*d.* had not been paid:—

Held, that twenty-four hours' notice to the occupier of the respondent's house of the intention of the appellants to enter the house where the smoke test was applied and examine the drain was not a condition precedent to the right of the appellants to recover the apportioned expenses from the respondent, inasmuch as the object of the twenty-four hours' notice required by the first part of s. 41 of the Public Health Act, 1875, is to enable the surveyor to enter when his entry, but for that notice, would be a trespass. The notice is not to enable the owner, who might ultimately be liable, to come and see the result of opening the drain, inasmuch as it is not to the owner it has to be given, but to the occupier.

Case stated by justices for the county of Kent.

A complaint was preferred by the appellants, the corporation of Bromley, in the county of Kent, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), for that on or about October 4, 1906, the appellants, in accordance with the provisions in that behalf of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, executed, or caused to be executed, certain works, to wit, remedying a nuisance in connection with a drain

taking the drainage of certain premises, No. 4, Tweedy Road, and other premises in the borough of Bromley, of which the respondent H. F. Cheshire was the owner; and that the appellants had incurred apportioned expenses to the amount of 23*l.* 9*s.* 2*d.* in or about the execution of the works; and that they on February 28, 1907, duly served, or caused to be served, on the respondent a notice in writing demanding payment of the 23*l.* 9*s.* 2*d.*, and that that sum had not, nor had any part thereof, been paid.

Upon the hearing of the complaint the following facts were proved:—

The drainage of two adjoining dwelling-houses known as Nos. 2 and 4, Tweedy Road, Bromley, was carried into the public sewer in Tweedy Road through a single private drain.

The dwelling-house No. 2, Tweedy Road was owned by one James Frederick Garrad and a Mrs. Lansbury; No. 4, Tweedy Road was owned by the respondent, and both houses were occupied.

On May 26, 1906, the sanitary inspector of the appellants, upon the written request of Thomas F. Harding, the occupier of No. 2, Tweedy Road, attended at No. 2, Tweedy Road and applied the smoke test to the drains of No. 2 and found that something was wrong, and suggested to Mr. Harding that he should inform the appellants that he suspected his drains were not right.

On May 29, 1906, Harding sent a letter to the appellants informing them that the drains at his house were a nuisance and asking them to have the necessary steps taken.

On May 30, 1906, Thomas Butler, inspector of nuisances to the appellants, sent to the appellants a document being an application for authority to open up and examine a certain drain on or belonging to No. 2, Tweedy Road, on the ground that the drain was a nuisance or injurious to health, and in this form of application the printed words "this is a case of emergency" were struck out.

The appellants on June 5, 1906, through their health committee, authorized the town clerk to serve notices upon the owners of Nos. 2 and 4, Tweedy Road, under s. 41 of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, to relay the drain.

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A notice dated June 15, 1906, addressed to the respondent, requiring him in conjunction with the owners of the adjoining premises to take up and relay the drain within one month from the date thereof, was duly served upon the respondent.

On July 3, 1906, the appellants' health committee resolved to recommend that the borough engineer be instructed to carry out the work on the default of the owners, which resolution was confirmed by the appellants in council on July 10, 1906.

The work of relaying the drain was done by the appellants.

The borough engineer subsequently made an apportionment of the costs of the work done, and apportioned the costs in respect of No. 4, Tweedy Road at 23*l.* 9*s.* 2*d.*

None of the work charged for was on or under the public highway.

On February 28, 1907, the appellants served upon the respondent a notice in writing demanding payment of the sum of 23*l.* 9*s.* 2*d.*, but it had not been paid.

The amount of the apportionment, the fact that the work had been done, and the demand for the money made were not contested, and the fact that the sanitary inspector was authorized by the appellants to open up the drain was admitted.

On the part of the appellants it was contended that all the requirements of s. 41 of the Public Health Act, 1875 (1), had

(1) Public Health Act, 1875, s. 41: "On the written application of any person to a local authority, stating that any drain water-closet earth-closet privy ashpit or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain water-closet earth-closet privy ashpit or cesspool. If the drain water-closet earth-closet privy ashpit or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain water-closet earth-closet privy ashpit or cesspool on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to

been fulfilled by the appellants, and that they were entitled to recover the amount claimed, notwithstanding that no twenty-four hours' written notice had been given to the occupier of No. 4, Tweedy Road of the intention of the appellants' surveyor or inspector of nuisances to enter and cause the ground to be opened and to examine the drain, and notwithstanding that no evidence of emergency had been given before the justices, the ground on the respondents' premises not having been opened until the work was done; that the justices could only deal with the question as to whether the notice to do the work had been duly served, and could not go into the question whether it was a case of emergency or not, as that was a matter to be decided entirely by the appellants.

On the part of the respondent it was contended that the twenty-four hours' written notice required under s. 41 of the Public Health Act, 1875, had not been given to the occupier of No. 4, Tweedy Road, and that no case of emergency had been proved; that, if there were a case of emergency, the fact should have been entered on the appellants' minutes; and that consequently the requirements of the Act of 1875 had not been carried out, and the appellants were not entitled to recover the amount claimed.

The justices were of opinion that, inasmuch as twenty-four hours' written notice of the intention of the surveyor or inspector of nuisances to enter and examine the drain had not been given to the occupier of No. 4, Tweedy Road, and no case of emergency had been proved, the requirements of the Public Health Act, 1875, had not been carried out, and they dismissed the complaint.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

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do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

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Morton Smith, for the appellants. The notice required to be given by the first part of s. 41 of the Public Health Act, 1875, is to be given to the occupier of "such premises"—that is, to the occupier of the premises on which the drain which is a nuisance is or is supposed to be. When the Act of 1875 was passed a single private drain for the purpose of draining more than one house did not exist for the purposes of the Public Health Acts. It was called into existence by s. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59). The object of the notice which is required under the first part of s. 41 of the Act of 1875 is to enable the local authority, by their surveyor or inspector of nuisances, to enter on the premises where the defective drain is or is supposed to be without committing a trespass. But there is nothing in the section which requires a notice to be given to the occupier of adjoining premises whose ground is not entered for the purposes of the examination of the defective drain. The object of the notice to the owner or occupier required by the second part of the section to do the necessary works is to enable the local authority to do the work and recover the expenses from the owner. Therefore the appellants were not bound to serve any notice on the occupier of No. 4, Tweedy Road before entry on No. 2, and requiring the owners of No. 2 and No. 4 to do the work necessary at their respective premises.

The respondent did not appear.

CHANNELL J. In this case the real question is whether the twenty-four hours' written notice required by s. 41 of the Public Health Act, 1875, to be given before entering premises has to be given simply for the purpose of enabling the surveyor to enter when his entry, but for that notice, would be a trespass, or whether the object is to enable the owner, who might ultimately be liable, to see the result of opening the drain. It could not, however, be the latter, because it is not to the owner it has to be given, but to the occupier. At the time of the passing of the Public Health Act, 1875, the question could not have arisen, because single private drains did not then exist. On the whole, I think that twenty-four hours' notice to

the occupier of No. 4, Tweedy Road was not a condition precedent to recovering the expenses from the owner, to whom the notice never would have been given in any case.

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BRAY J. I am of the same opinion.

SUTTON J. I agree.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parker & Co., for W. Jermyn Harrison, Bromley.*

J. E. A.

WILFORD AND OTHERS *v.* COUNTY COUNCIL OF THE WEST RIDING OF YORKSHIRE.

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Jan. 28, 29, 30, 31; *Feb.* 3.

Schools (Education)—Public Elementary School—Non-provided School—Duty of Local Education Authority—Maintain and keep Efficient—Direction limiting secular Instruction to Infants—Decision of Board of Education—Jurisdiction of Court—Injunction—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-ss.* 1 (*a*), 3; *s.* 16.

A non-provided school had been carried on before and after the coming into force of the Education Act, 1902, as a public elementary school for the education of children of both sexes in all standards from 1 to 7. The local education authority issued a direction to the managers of the school that after a certain date no secular instruction was to be given in the school except to children in standards 1 to 3. The managers of the school refused to comply with the direction, and brought an action for an injunction to restrain the local education authority from obstructing or interfering with them in the discharge of their duties as managers of a fully recognized public elementary school:—

Held, that the direction was not a direction as to secular instruction within s. 7, sub-s. 1 (*a*), of the Education Act, 1902, and was ultra vires, being in breach of the obligation imposed on the local education authority by s. 7, sub-s. 1, to maintain and keep the school efficient; that the question as to the right of the authority to enforce the direction was not a question arising under s. 7 which had to be determined by the Board of Education under sub-s. 3 of s. 7 or s. 16; that the Court had jurisdiction to entertain the action; and that the managers were entitled to an injunction restraining the local education authority from enforcing the direction.

ACTION tried by Channell J. without a jury.

The plaintiffs were—(1.) five of the managers for the purposes of the Education Act, 1902, of the Garforth parochial

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public elementary school; (2.) the trustees of the site and premises of the school; and (3.) parents of some of the children attending the school.

The defendants were the local education authority for the county of the West Riding of Yorkshire, within which area the Garforth parochial school was situate.

The premises of the school were, in virtue of a trust deed dated December 1, 1882, held by the trustees in trust for the purpose of educating the children of Garforth in the Christian religion according to the doctrines of the Church of England, and for the purpose of being a public elementary school in accordance with the Education Acts. The school had since 1882 been carried on as a public elementary school, and had been recognized by the Board of Education, and since the coming into force of the Education Act, 1902, by the defendants, as a mixed school providing elementary education for children of both sexes in all standards from standard 1 to standard 7 and having a department for infants.

In 1907 the defendants provided and opened at Garforth a new public elementary school, and, questions having arisen with regard to a want of accommodation in the parochial school, the defendants suggested a joint working arrangement between the two schools, whereby the parochial school should be used as a junior mixed and infants' department, while the new provided school was to be carried on as a senior mixed department.

The managers of the parochial school did not agree to this proposal for reorganization, or with certain other proposals of a similar character put forward by the defendants. Eventually, on September 6, 1907, the defendants addressed to the managers a letter, directing that on and after September 16, 1907, the secular instruction to be given in the parochial school in the department for older children must be confined to the subjects set out in the syllabus provided for classes 1, 2 and 3 (otherwise standards 1, 2 and 3) in the scheme of instruction for the year 1907-8, which had been approved on behalf of the education committee on January 18, 1907; and that no secular instruction other than that set out for classes 1, 2 and 3 must be given in the school after September 16, 1907, except that for the period

ending March 31, 1908, children in standard 7 then in attendance at the school might receive instruction in the subjects set out for class 6.

The plaintiffs refused to carry out these directions, contending that they were ultra vires of the defendants and void; and that their effect would be to remove about half the scholars attending the school and to destroy the school as a complete mixed school giving instruction in all the standards, and that parents would be deprived of their right to elect whether to send their children to the parochial school or to the new provided school.

The plaintiffs claimed (inter alia) an injunction restraining the defendants from obstructing or interfering with the plaintiff managers in the exercise and discharge of their rights and duties as managers of a fully recognized non-provided public elementary school in accordance with the provisions of the Education Acts.

The defendants contended that the letter of September 6, 1907, constituted a direction as to secular instruction to be given in the school within s. 7, sub-s. 1 (*a*), of the Education Act, 1902, and they alleged that, after the plaintiffs' refusal to comply with the direction, the question arising between the plaintiff managers and the defendants had been brought before the Board of Education for determination under s. 7, sub-s. 3, of the Act of 1902, and that the Board had determined the question by deciding that the directions of the defendants should be complied with. The defendants further contended that the facts alleged in the statement of claim disclosed no cause of action.

Sir R. B. Finlay, K.C., and *Montague Barlow*, for the plaintiffs. The case raises two questions: First, whether the defendants had power to direct that the school should only be used for the instruction of children in standards 1 to 3; and, secondly, whether the Court has jurisdiction to entertain the plaintiffs' complaint, the contention of the defendants being that under s. 7, sub-s. 3, or s. 16 of the Education Act, 1902, the Education Board was the proper tribunal for dealing with the questions in dispute. With regard to the first question, the

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school is a public elementary school; it is not suggested that it was not necessary, and therefore, under s. 7 of the Act of 1902, it is the duty of the defendants to maintain the school and keep it efficient, as it existed at the date of the passing of the Education Act, 1902: *Attorney-General* v. *County Council of West Riding of Yorkshire* (1)—that is, a school for the instruction of children in all the standards. The direction that only the first three standards are to be taught in the school is a manifest failure to maintain it or to keep it efficient, because it will confine attendance at the school to children under the age of ten or eleven years, and all children above that age will be compelled to attend the defendants' provided school. The local education authority has, under s. 5, complete control over the secular education to be given in a non-provided school, and can give directions as to what subjects shall be taught, but they have no power to order a general prohibition of instruction in any subject above standard 3, the effect of which will be completely to alter the character of the school. Further, the local education authority have no power over the religious instruction given in non-provided schools, but if the direction of the defendants is upheld the result in this particular parish will be that no child over the age of ten or eleven will be able to receive Church of England instruction in a public elementary school.

With regard to the second question, it is contended by the defendants that the question in this case is one which, under s. 7, sub-s. 3, of the Act, has to be determined by the Board of Education, and that the Board have in fact decided the question in favour of the defendants. The powers of the Board under that sub-section are, however, confined to questions arising under s. 7. The question involved in this case is, in substance, whether this school is to be carried on as heretofore, and that cannot be said to be a question arising solely under s. 7, for it depends on a consideration of the whole scope of the Act of 1902. The plaintiffs do not admit that the Board has determined the question, but, if it has, its decision was ultra vires. Then it will be said that if s. 7, sub-s. 3, does

(1) [1907] A. C. 29.

not apply, the only remedy open to the plaintiffs is by an application to the Board under s. 16. There are two answers to that contention: First, that s. 16 only applies to cases of nonfeasance, whereas the present case is one of misfeasance; and, secondly, the authorities shew that, when a statutory remedy is provided, it is not necessarily the only remedy. To oust the ordinary jurisdiction of the Courts it must clearly appear from the terms of the particular enactment in question that it was the intention of the Legislature that the statutory remedy should be the only remedy, and the statutory remedy must be co-extensive with the right infringed, and must cover all possible cases; neither of these conditions is fulfilled here: *Bishop of Rochester* v. *Bridges* (1); *Pasmore* v. *Oswaldtwistle Urban District Council* (2); *Baron* v. *Portslade District Council* (3); *Dublin United Tramways Co.* v. *Fitzgerald* (4); *Mayor of Lichfield* v. *Simpson*. (5)

In the circumstances of this case the plaintiffs are therefore entitled to an injunction: *Cooper* v. *Whittingham* (6); *Sanitary Commissioners of Gibraltar* v. *Orfila* (7); *Glossop* v. *Heston Local Board* (8); *Stevens* v. *Chown*. (9)

Danckwerts, *K.C.*, and *Sargant* (*A. M. Latter* with them), for the defendants. In order to bring a voluntary or non-provided school within the Act of 1902 it must be a public elementary school—that is to say, it must comply with the conditions of s. 97 of the Act of 1870 and of s. 7, sub-s. 4, of the Act of 1902 as to earning the parliamentary grant in accordance with the requirements of the Code. If a school is a public elementary school, the local education authority is bound to maintain it and keep it efficient. The managers of a non-provided school, under s. 7, sub-s. 7, have the powers of management requisite for carrying out the Act, subject to the powers of the local education authority under s. 7, to whom, under s. 5, the control of secular instruction is given. Both the managers and the local authority can therefore disregard the trustees; but they are both subject to the

(1) (1831) 1 B. & Ad. 847.
(2) [1898] A. C. 387.
(3) [1900] 2 Q. B. 588.
(4) [1903] A. C. 99.
(5) (1845) 8 Q. B. 65.
(6) (1880) 15 Ch. D. 501.
(7) (1890) 15 App. Cas. 400.
(8) (1879) 12 Ch. D. 102.
(9) [1901] 1 Ch. 894.

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Board of Education. If the Board withdraws the grant in respect of any particular school, that school ipso facto ceases to be a public elementary school, and it follows that the test for deciding whether a school has been maintained and kept efficient is its ability to earn the parliamentary grant. The Education Board through its Code determines the requisites for earning the grant. There is nothing in the Code to prevent the Board from saying, as it has said in this case, that it will treat a particular school as efficient in which the subjects comprised in certain specified standards only are taught. The Education Acts do not in any way prescribe the nature of the instruction to be given in the schools, except that it is to be elementary: *Reg.* v. *Cockerton.* (1) The instruction to be given is to be found in the Code, which also, in arts. 10 and 25 (*b*), contains directions as to the organization and co-ordination of schools in a district, having regard to the circumstances and needs of the locality, with a view to the promotion of efficiency. The directions given by the defendants in the present case are entirely in accordance with the requirements of the Code, and are clearly directions as to secular instruction within the very wide language of s. 7, sub-s. 1 (*a*), of the Act. The questions which may arise under s. 7 between managers and the local authority must necessarily be of a highly technical character, and the Legislature has by sub-s. 3 advisedly withdrawn the consideration of these questions from the Courts of law, and has left them to be determined by the Board of Education. The Board, being an administrative body, is entitled in considering those questions to decide them from the point of view of expediency: *Peebles* v. *Oswaldtwistle Urban District Council.* (2)

The duty imposed on the local education authority by sub-s. 1 of s. 7 is a general public duty, and a breach of that duty gives no right of action to individuals; if there be a breach of duty in respect of a particular school, then there is a question between the managers of that school and the local authority within sub-s. 3 of s. 7; if, on the other hand, the breach is of a duty owed to the public at large, then the remedy for the

(1) [1901] 1 K. B. 726. (2) [1897] 1 Q. B. 625.

non-performance of that duty is under s. 16. The matters in dispute having been relegated to the Board of Education, and a decision having been given by the Board, the jurisdiction of the Court to entertain this action is ousted: *Blencowe* v. *Northamptonshire County Council* (1); *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (2); *Crosfield* v. *Manchester Ship Canal Co.* (3); *Norwich Corporation* v. *Norwich Electric Tramways Co.* (4); *Barraclough* v. *Brown* (5); *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6); *Offin* v. *Rochford Rural District Council* (7); *Williams* v. *North's Navigation Collieries.* (8) Art. 26 of the Code also shews that this action is not maintainable, for that article provides that the decision of the Board as to the fulfilment of such of the conditions, necessary to obtain the grant, as are not directly imposed by Act of Parliament shall be final. The managers having failed to comply with the defendants' directions, the school has ceased to be maintainable as a public elementary school: *Young* v. *Cuthbert.* (9)

Sir R. B. Finlay, K.C., in reply. The illegal action of the defendants cannot have the effect of causing this school to be no longer a public elementary school. It was never suggested in the *West Riding Case* (10) that the decision of the Board was final.

[*Danckwerts, K.C.* It was agreed in that case that the question of jurisdiction should not be raised.]

The decision in *Blencowe* v. *Northamptonshire County Council* (1) is not in point, for Warrington J. there held on the facts that there had been a direction as to secular instruction, and that the question was therefore one for the decision of the Board of Education under s. 7, sub-s. 3. The action of the Board in this case cannot be justified either under the Act of 1870 or the Code, and it can only be justified under the Act of 1902 if there has been a direction as to secular instruction; a direction which has the effect of prohibiting

(1) [1907] 1 Ch. 504.
(2) (1874) L. R. 2 H. L. Sc. 347.
(3) [1905] A. C. 421.
(4) [1906] 2 K. B. 119.
(5) [1897] A. C. 615.
(6) [1906] 1 Ch. 324.
(7) [1906] 1 Ch. 342.
(8) [1904] 2 K. B. 44.
(9) [1906] 1 Ch. 451.
(10) [1907] A. C. 29.

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instruction of any kind to all children over a certain age is not a direction as to secular instruction within s. 7.

Cur. adv. vult.

Feb. 3. CHANNELL J. read the following judgment:—In this action certain persons claiming to be interested in a Church of England school at Garforth, in the West Riding of Yorkshire, complain of grievances which they allege they have sustained by the action of the defendants, who are the local education authority for the West Riding; and the principal question in the action, and the only one which gives me serious difficulty in deciding, is whether the High Court of Justice has jurisdiction to entertain the complaint, the suggestion of the defendants being that the matter is excluded entirely from the jurisdiction of the High Court and given to the Board of Education. This obviously makes it necessary to define clearly what is the exact complaint which the plaintiffs make. Now the school in question, the Garforth parochial school, was, prior to the happening of the matters in question in this action, beyond all doubt a public elementary school within the meaning of the Education Acts. It was recognized in every way as such, and was what is known and described since the passing of the Act of 1902 as a non-provided school. It had been founded in or about the year 1882 under a trust deed purporting to be made under the School Sites Act, 1841, for the education of children according to the doctrines of the Church of England. After the coming into force of the Education Act, 1902, it had a body of managers appointed in the way provided by sub-s. 2 of s. 6 of that Act, consisting of four foundation managers and two others, one of whom was appointed by the defendants. The original plaintiffs in this action were the five managers of the school other than the manager appointed by the defendants, and they stated on the writ that they sued on behalf of themselves and another as managers. The manager appointed by the defendants has not been made a party to the action either as plaintiff or as defendant, but no objection is taken by the defendants to that. Subsequently there were added as plaintiffs by amendment

certain persons who alleged themselves to be the trustees of the school and certain persons who alleged themselves to be parents of children attending the school and stated that they sued on behalf of themselves and all others the parents of children attending the school. On the trust deed being put in evidence at the trial, a doubt arose as to who really were now the trustees of the school, the deed being in a peculiar form, and its effect as a conveyance of the legal estate being extremely doubtful. Thereupon it was agreed between counsel, in order to facilitate the decision of the real matters in question in the action, that the trustees should be struck out as plaintiffs without costs on either side, and on the terms that no objection that the trustees ought to be joined should be taken either before me or in any Court of Appeal from my decision. The plaintiffs therefore appear to be persons interested in having the school carried on in the way it has hitherto been, as a Church of England non-provided public elementary school; and if the complaint which they make that this has been wrongfully interfered with by the defendants can be made in this Court by any one, it must be taken that the plaintiffs before me are the right persons to make it.

The complaint of the plaintiffs is this. The school has always been carried on as a school for scholars of all school ages. There is a separate infants' school, and also a mixed school—that is, a school for boys and girls to be taught together—for boys and girls above the age of infants. Those scholars have been taught in all standards, so that a scholar could, by attendance at this school, go through his whole school course and obtain by attendance there, and without going to any other school, all certificates as to his attendance and proficiency necessary under any of the Acts of Parliament either for his employment at any particular age or for any other purpose. Further, the persons carrying on the school were permitted to give, subject to the well-known restrictions and to the right of parents to withdraw their children from it, religious instruction according to the doctrines of the Church of England to scholars throughout the whole of their school career, and the parents desiring such instruction for their children were thus enabled to get it. The accommodation,

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however, in this school has not been in recent years, even if it ever was, sufficient to accommodate all the children in the parish. There appears also to be in the parish a Roman Catholic school, but it seems that that and the Church school together did not provide the accommodation required. For some time there was, in addition, a temporary school provided, and recently a new school has been provided by the defendants, so that now the parish appears to have ample elementary school accommodation. For some reason, however, which was not explained, the defendants confined their newly provided school to the standards or classes above the third. Questions have recently arisen as to the extent of the accommodation in the plaintiffs' school, and the defendants have, with the sanction and approval of the Board of Education, revised the figures as to the accommodation which they will recognize as being provided by the plaintiffs' school. This the defendants have quite clear power to do, as the plaintiffs admit. The matter is referred to in the statement of claim, and is mentioned from time to time in the correspondence which is in evidence before me, and was, to some extent, discussed in argument by counsel on both sides; but I think, in the end, they both agreed that it was only indirectly that it had anything to do with the matter really in question in the action, and I certainly am of that opinion. Incidentally, no doubt, one of the alterations recently made as to the amount of accommodation to be recognized in the infants' school was consequential upon the suggested reorganization, which is the main subject of complaint in this action. I do not think it necessary to deal further with this matter of the accommodation, except to say that, while I am clearly of opinion that all questions of this kind are entirely for the decision of the local authority, with appeal if necessary only to the Board of Education, and that they are not matters to be reviewed in a Court of law, yet I think it clear also that, in the circumstances of this case, these questions cannot be used to bring within the exclusive jurisdiction of the Board of Education the matters which are the main cause of complaint, and as to which I must consider, on other grounds, whether they are or are not within that exclusive jurisdiction. I should add to the statement of facts that the school has always had more

than thirty scholars, and therefore has always been necessary under s. 9.

This brings me to the main cause of complaint, which is that the defendants claim the right to direct that the plaintiffs' school shall be conducted only as a school for infants, and as a junior school for the lower standards, 1, 2, and 3, and that all scholars who, at the time of the direction, were being taught in standards 4 to 6 should leave this school and attend the new provided school for instruction in those upper standards. Scholars in standard 7 were to be allowed to remain for a time on the ground that they would be shortly completing their school life. At one time it was directed that scholars in standard 3 should also be removed, but this appears to have been a mistake, and was withdrawn. It is unnecessary to state accurately the exact details or how far the original proposals have been modified. The substance is that the defendants claim to take away from the Church school all scholars who there pass through standards 1, 2 and 3, which is usually done about the age of ten, or between that age and the age of eleven years. In fact, the defendants, by the action of officers for whose acts they are, in my opinion, clearly responsible, took active steps to give effect to this claim by a circular to parents of children attending the school, and by directing that the entry of the attendance of all children in standards over the third should be erased from the attendance book. In argument, however, the counsel for the defendants justified the claim rather as a threat to cease paying any of the expenses of the school if the directions were not complied with, than as a claim to prevent the plaintiffs from continuing to receive and teach the scholars in question if they were willing to do so at their own expense. It may be that the point whether the defendants only claimed to be entitled to cease making payments for the school if it was not converted into a junior school, or whether they took active steps to convert it into a junior school, may not be a point of importance, because, if the direction to convert it into a junior school can be justified under the power to give directions as to the secular instruction in the school, then the defendants, in addition to their power to cease paying, appear to have, under s. 7, sub-s. 1 (*a*), of the Act

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of 1902, power to carry out themselves the direction in question as if they were managers.

The real questions in this action, therefore, are whether the defendants had power to direct, and, in default of obedience, themselves to carry out and enforce the direction, that this school should be carried on in future only as an infants' and junior school, teaching only scholars up to about the age of eleven, and then passing on those scholars to the provided school; and, further, whether the question of the defendants' having or not having that power is one which the High Court of Justice is deprived of its prima facie jurisdiction to inquire into, on the ground that it is a "question arising under" s. 7 of the Act of 1902, and therefore reserved to the exclusive jurisdiction of the Board of Education.

Now, the effect of the direction in question is obviously to alter the whole character of the school. The reason why the plaintiffs object to it is that it takes away from them the opportunity which they say the law allows to them, subject to certain restrictions, notably subject to objection by parents of particular scholars, of giving religious education in accordance with the doctrines of the Church of England to scholars throughout the whole of their school life, and the motive which the plaintiffs attribute to the defendants is that the defendants intended by their action to bring about this result and to interfere with the religious education given. I think, however, that I have to do only with the acts of the defendants and their results, and have not to decide anything as to the motives of the defendants' action. True it is that the defendants, in giving directions as to secular education, are under the restriction that such directions shall be "such as not to interfere with reasonable facilities for religious instruction during school hours"; but this, so far as the words themselves are concerned, must relate to scholars who are there, and if the power otherwise exists to take away willing scholars from the school, I do not think that the taking them away under that power could be directly objected to on the ground that it took them away, amongst other things, from religious instruction. If the power exists in law, even the malicious exercise of it would not make it actionable (*Allen* v. *Flood* (1)), and a fortiori mere

(1) [1898] A. C. 1.

motive would not. I do not think the case could be brought within the principle that a power given for a particular purpose must, as a rule, be exercised bona fide for that purpose and not for a different purpose. The result of the defendants' action is, however, a thing which I must look at, and that result seems to me clearly to be to alter the fundamental character of the school, and wholly to frustrate the object for which it was founded and has been carried on. The fact which was proved in evidence, that junior schools for lower standards only are a known class of schools, not very common in proportion to other schools, but still existing, is to my mind an additional reason for saying that the proposed reorganization changes the character of the school from one thing to another. It was admitted by the witness for the defendants that this is the first attempt to do such a thing against the will of the managers. Now, does the power to give directions having that effect exist in law?

I consider that the matter is covered by the decision of the House of Lords in *Attorney-General* v. *County Council of the West Riding of Yorkshire*. (1) The eight Law Lords who either gave judgment or agreed in the judgments given in that case were unanimous in saying that the obligation of the local education authority to maintain a non-provided school is to maintain it as it is. The Lord Chancellor, with whom five other Law Lords, without giving separate reasons, agreed, says it is to "maintain the schools as they are and not as they might be." Lord Davey says in one passage (2), "the school such as it is, with all its staff of teachers, apparatus, and appliances"; and in another passage, "the school and all the instruction lawfully given in it." Lord Robertson says (3) "the obligation to maintain applies to each extant school as if it were named"; and Lord Atkinson expressly agrees with Lord Robertson, as well as with the Lord Chancellor. The result clearly is that these voluntary schools have to be maintained, as long as they are necessary—that is, as long as there are parents of children to the number of thirty who desire to send them there, and they have to be maintained as such schools as they are, religious instruction and all. Now

(1) [1907] A. C. 29. (2) [1907] A. C. at p. 38.
(3) [1907] A. C. at p. 41.

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Mr. Danckwerts tells me that in that case (where the decision of the Education Board had been against his then contention) it was expressly agreed between him and the late Attorney-General that the point that the decision of the Board of Education was conclusive should not be taken, it being the desire of all parties that the Court should decide the legal question on its merits. Now, of course, I absolutely accept Mr. Danckwerts' statement that this was the fact; but it is quite consistent with that that the late Attorney-General, in addition to his desire to have the legal question decided, may have thought the point a bad one. Further, I find no trace in the reports of the case of any of the judges or Law Lords being conscious that they were giving their decision by agreement between the parties on a matter in which, but for that agreement, or rather, I should perhaps say, even with that agreement, they had no jurisdiction. It may be that the case, under the circumstances, cannot be treated as a decision that there was jurisdiction, but none of the Law Lords seems to have noticed the point or thought it worth mentioning, or made any reservation as to the effect of his judgment on future cases, although the Law Lords certainly had their attention directed to sub-s. 3 of s. 7, because several of them point out matters which they say are matters for the Board of Education only. Mr. Danckwerts did suggest, but somewhat tentatively, that the decision of the House of Lords might, under the circumstances, be treated as coram non judice. I do not take that view, though, of course, I assume the facts; but even if I did, I should, out of respect for the opinion of the Lord Chancellor and the other seven Law Lords, hold as a matter of law that the word "maintain" in s. 7 meant what they all said it did.

Now, that being so, it appears to me, assuming that I have jurisdiction to say what is the legal construction of s. 7, that I must say that the defendants are under an obligation by virtue of that section to maintain this school as the school it was, that is, as a complete school for children of all school ages, and giving instruction in all branches, classes, or standards for the time being taught in public elementary schools (subject, of course, to the power to vary from time to time the syllabus or details of instruction), and that there was no power to turn it into an infant school, or a

junior school taking only the younger children just over the age of infants. The powers to control and give directions as to secular instruction in the school cannot possibly include a direction to discontinue secular instruction altogether to individual scholars or to scholars of a particular age, or to all scholars who had attained to a certain degree of proficiency by passing standard 3, but who had not finished their school career and still had to be further educated somewhere, and where there is an obligation to maintain a particular subject-matter so long as certain conditions are observed, including amongst those conditions obedience to directions to be given from time to time by the person liable to maintain, it seems clear that directions cannot be given which will destroy the subject-matter to be maintained and thereby the obligation to maintain.

I was told that the right to do this depended rather on the Code than on the statutes, and two somewhat vague provisions in the Code—ch. 2, art. 10, and ch. 5, art. 25 (*b*)—as to the "co-ordination of schools in the district" were referred to. I do not think these really apply to this case. They only deal with the degree of efficiency to be required in staff and school, and indicate that a less degree of efficiency may be passed if other schools in the area supply the defect; but the reason why, as it seems to me, it is not necessary in this case to go into the details of the various provisions of the Code is that here the real question is whether what is being done is not in my view of it, and by reason of its results, a contravention of the statute, and I think it is. The Code itself (ch. 5, art. 26) says that the Board's decision is only to be final as to conditions not directly imposed by Act of Parliament.

Now, this being my view as to the true construction of the Act of Parliament, have I or have I not jurisdiction to entertain the plaintiffs' complaint? The argument that I have not is founded mainly on sub-s. 3 of s. 7 of the Act of 1902, but s. 16 of the same Act is also called in aid. Sub-s. 3 is: "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education." Is the plaintiffs' complaint a question arising under the section

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within the meaning of the sub-section? Now, in the first place, I do not consider that the view which I take, that the so-called voluntary schools were intended to remain substantially as they were, and to be used as part of the machinery of the elementary education of the future, but to have additional pecuniary aid, depends on s. 7 alone. It is to be gathered from the whole scope and tenor of the Act, and from the comparison of it with the antecedent legislation, and importing the knowledge which every one has, and which the Legislature had, of the state of things which existed at the time of the Act. I was invited to take a broad view of the matter, and I think this is the broad view. I think that an argument based on going through the Acts and the Code and picking out a word or two here and a word or two there is just what leads to a narrow view, and that it is the kind of argument which in the former *West Riding Case* (1) misled the majority in the Court of Appeal, and which the House of Lords disregarded when they took the broad view that the Act had really said that which every one knew it had been intended to say.

The plaintiffs' case, therefore, does not, in my opinion, depend on s. 7 alone, although no doubt that is a very material, perhaps the most material, section. It depends on considerations to which sub-s. 3 would not apply. Further, I think the words "if any question arises under this section" really mean "any question on facts arising under this section," and do not cover the enforcement of the obligations of the section. The enforcement of obedience to the law must, as it seems to me, always rest with the tribunals of the country, although it is not uncommon in modern legislation to depute to some person or body assumed to be skilled in the matter the sole power of deciding matters necessary to be decided in applying the law. In such cases the Courts always strictly confine the person so deputed to the limits of his jurisdiction, and I think I have got to do that here. Here, if I am right in my interpretation of the law, when I say that no direction can be given which will alter the fundamental character of the school, altering it from a school of one class to

(1) [1907] A. C. 29.

a school of a different class, and thereby frustrating the fundamental object for which the school was founded and has, with the sanction of the Legislature, been carried on, then it seems to me that there is nothing left but the enforcement of obedience to the law, and no question arises on the section which the Board of Education have got to determine. One thing certainly neither the defendants nor the Board of Education can do, and that is to say that because they do not like the law as it stands they will give directions which will frustrate its objects. They do frustrate its objects if they destroy this school as it has existed, with its right to give its religious instruction to scholars of all school ages, and leave it only as an infants' and junior school giving such instruction only to children under eleven years of age, who are after that age to go on to another school, where they will inevitably forget what little they could have been taught up to that age, even if nothing is done actively to eradicate it. In this case the defendants disclaim any such intention. Mr. Brown (1) says that religious education is such a thorny subject that his board never consider it, and did not in this case. I think Sir Robert Finlay was right in replying that they ought to have done so. They must take the school as they find it; they may give directions for improving its education, but these directions must not be such as to amount in themselves to a breach of their obligations to maintain; and they should consider all points relevant to the question whether they are destroying the school as it existed.

As to the authorities on the question of what under this section is within the province of a Court of law and what only within the province of the Board of Education, there is little, if any, authority. The decision of the House of Lords, where jurisdiction was apparently assumed, cannot probably, on the facts which I know from Mr. Danckwerts, be treated as an authority that the jurisdiction exists, though I regard it as an authority on the interpretation of the section so far as regards the word "maintain," and there seems only the decision of Warrington J. in *Blencowe* v. *Northamptonshire*

(1) A witness called by the defendants.

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County Council (1) to be considered. There the plaintiffs complained of the giving of certain directions by the local education authority purporting to be given as directions in reference to secular education, but which the plaintiffs said were an unlawful interference with religious education, and the question of the exclusive jurisdiction of the Board of Education was discussed. The learned judge went into the question whether the directions complained of were directions as to secular education, and came to the conclusion that they were, and, having come to that conclusion, he then said that the matter was within the exclusive jurisdiction of the Board of Education, as to which, when that conclusion was arrived at, I should think there could be no doubt. But the fact that he went into the matter at all, and decided whether the directions did or did not relate to secular education, seems to shew that he did not adopt the argument which is put before me now, and which, I think, was also put before him then, that the mere fact that the plaintiffs have to rely on s. 7 in itself shews that a question has arisen under s. 7 which excludes the jurisdiction of the Court.

I come to the conclusion that no question here has arisen which excludes the jurisdiction of the Court. I further think that the directions given by the defendants were ultra vires, that there was no jurisdiction in the Board of Education to decide that they were intra vires, and any decision purporting to do so was ultra vires of the Board. To decide that the law is not what it was declared to be by the House of Lords is, in my opinion, ultra vires, and, the law having been in fact so declared, it does not seem to me to signify that for the very purpose of getting it declared a point was waived which it is possible might have been taken so as to preclude discussion. In truth and substance the course taken in the present case seems to me to be simply an attempt to get out of the decision of the House of Lords that voluntary schools must be taken as they are. I am prepared to decide, and do decide, that it is an unsuccessful attempt, but I must admit that there are words in the Act which make it a matter of some doubt whether a Court of law can interfere if the

(1) [1907] 1 Ch. 504.

Board of Education are prepared to take the responsibility of disregarding the law.

There are some points remaining to be shortly dealt with. The question here being as to the power of the Board to decide, it is unnecessary to go into the facts as to the decisions which they did give, on the effect of which several points of doubt occur to me. It is also unnecessary to deal with the cases quoted to me as to a statutory remedy, when given as part of the enactment creating an obligation, being prima facie the only remedy for breach of that obligation. I may point out, however, that, even where that rule applies as to the remedy for a breach, there is still power to grant an injunction to prevent a breach. Another point made on behalf of the defendants was that none of the plaintiffs had any legal right, that their real claim was for a grant, or rather for the maintenance which now takes the place of a grant direct to the school, and that all grants were mere gifts voluntary on the part of the nation and administered at the discretion of the Board of Education, and that no action can be brought for the failure to get an expected or even a promised gift. This may well have been the case with the first grants for educational purposes, but it has certainly ceased to be so. They are now statutory, and where a statute creates a binding obligation on one person or body in favour of another person or body, it thereby creates a correlative right on the part of the person or body in whose favour the obligation is created. It is, I think, hopeless to say that s. 7 means something of this kind, "shall maintain all schools so long as they comply with certain conditions elaborately set out in the section, but that nevertheless the maintenance may be withdrawn whenever the Board of Education think fit to do so." Nothing of that kind can, in my opinion, be read into the section, but it would be necessary to do so to give effect to this argument of the defendants.

The argument addressed to me by Mr. Sargant was a plausible one. He said there is a dilemma. If s. 7 creates a binding obligation, it is either an obligation to the managers or to the public. If to the managers, then a question has arisen between the managers and the local authority under sub-s. 3, or if to the public only, then s. 16 applies as to the non-performance of the public

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duty. As to the first horn of that dilemma, what I have already said as to their position, on the assumption that the managers have the right, gives my answer. As to the second horn of the dilemma, if the point arises, which I think it does not, the answer is that s. 16 does not apply to misfeasance, which the act of the defendants appears to me to amount to. As to parents' rights, I think they have some rights on the principle that rights and obligations are correlative, but they are very much qualified rights. The right of a parent seems to be to have his child, being over five years of age, admitted to any public elementary school, unless the refusal can be justified on reasonable grounds. As the grounds which might arise and be reasonable must in any case be numerous, I might almost say infinite, the right is one which could hardly be dealt with practically. Further, it has not been interfered with by these defendants, unless the defendants are to be taken as having assumed the position of managers in default of obedience to their directions. As to the circular, at most that has only disturbed the minds of the parents; their children have, in fact, continued at the school, and I do not see my way to giving them any relief against the defendants, and I am not quite sure that I am asked to do so, or, if I am asked, what it is which is asked. As to the relief to be given to the managers, I think they have asked for something too wide, and that if given in the form asked for, I should appear to be deciding matters as to accommodation and other things which I do not intend to deal with.

I think there should be, first, a declaration that the plaintiff managers, with another manager appointed by the defendants, have not ceased to be entitled to carry on the parochial school at Garforth as a fully recognized non-provided public elementary school by reason of non-compliance with the directions of the defendants to convert that school into an infants' and junior school; secondly, that the directions of the defendants to convert the said school into an infants' and junior school are ultra vires of the defendants and void, and, if acted on, would be a breach of the defendants' obligation to maintain the school; and, thirdly, an injunction restraining the defendants, their servants or agents, from taking any steps to enforce the conversion of the said school

into the infants' and junior school. I give judgment for the plaintiffs in accordance with this, and with costs.

Judgment for plaintiffs.

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Solicitors for plaintiffs: *Crawley, Arnold & Co.*

Solicitors for defendants: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

F. O. R.

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Inland Revenue—Male Servants—Waiter—Cook—Steward—Persons employed as in Trading Establishment—Customs and Inland Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *s.* 19.

The Customs and Inland Revenue Act, 1869, which imposes a tax upon male servants, is prima facie intended to apply only to servants employed in private establishments, and not to servants employed for purposes of trade, even though they may be employed in any of the capacities enumerated in the Act as being included in the expression "male servant."

CASE stated by a metropolitan police magistrate.

The appellants, who are the owners of a large retail emporium, were summoned for employing thirty-five male servants without having proper licences. At the hearing the following facts were proved or admitted:—

The respondent, an officer of the Commissioners of Inland Revenue, visited the appellants' premises on December 17, 1906, and saw a number of men employed in various ways, such as removing plates, knives and forks and tables, preparing food in the kitchen, washing up dishes, &c., and waiting on assistants employed by the appellants when breakfasting, dining, &c.

The premises in question (in Westbourne Grove and Queen's Road) were used for the purpose of the appellants' business as universal providers, &c.

A large number of assistants (1600) are served with breakfast, dinner, tea, and supper on the premises daily. To these meals they come in batches. It is for this purpose that the men in question are employed.

It was not contested by the appellants that they had in their

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employment the thirty-five men in question, and there was no substantial difference between the appellants and the respondent as to the nature of the duties of those men. The evidence shewed that the duties of the said men other than those specifically referred to below were to carry the joints from the kitchen to the table, to carry the vegetables and the tea urns, to carry plates, to wait on the assistants at table, to clear the table, wash up and lay the table for the next meal, to clean knives and plates, to peel the potatoes, and to carry stock pots from the stove to the lift.

It was proved that some of this work, owing to the weight of the articles to be carried, was unsuitable for female servants. The duties of the steward were to superintend the other men and to attend to the buying of the necessary provisions. Four men were employed as cooks.

There were no licences in force for any of these men at the date in question.

The magistrate held that the men in question came within the definition of "male servants" in s. 19 of the Customs and Inland Revenue Act, 1869 (1), and he accordingly convicted the appellants.

Montague Shearman, K.C., and *Macoun*, for the appellants. The provisions of ss. 18 and 19 of the Customs and Inland Revenue Act, 1869, are, so far as they relate to "male servants," intended to tax luxuries only. The majority of the servants enumerated in the definition of "male servant" in s. 19, sub-s. 3, belong to a class only to be found in the private houses of

(1) By s. 18 of the Customs and Inland Revenue Act, 1869: "On and after the first day of January one thousand eight hundred and seventy there shall be granted . . . . the following duties, that is to say:

"For every male servant, 15*s*."

By s. 19, sub-s. 3: "The term 'male servant' means and includes any male servant employed, either wholly or partially in any of the following capacities; that is to say, maître d'hotel, house steward, master of the horse, groom of the chambers, valet de chambre, butler, under butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under gardener, park keeper, gamekeeper, under-gamekeeper, huntsman and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called;"

wealthy persons. It was not intended to tax servants employed for purposes of trade, even though employed in some of the capacities mentioned in the definition. Here the appellants' servants are employed solely for the purposes of their business. It is true that by s. 4 of the Customs and Inland Revenue Act, 1873 (36 & 37 Vict. c. 18), it is to be unnecessary for an innkeeper to take out a licence "for any servant wholly employed by him for the purposes of his business." But that section did not introduce a new exemption. It was passed only for the purpose of resolving doubts.

Sir William Robson, *A.-G.*, and *W. Finlay*, for the Crown. The question whether servants employed in trade should be taxed has always been present to the mind of the Legislature. At first only domestic servants were taxed, and there was an express general exemption of servants employed in trade. The first Act is that of 1777 (17 Geo. 3, c. 39). Sect. 1, which deals with the several capacities employment of servants in which is to render them liable to the tax, is in nearly the same terms as the corresponding section of the present Act, except that it does not contain the word "waiters." And s. 2 is a proviso, "That this Act shall not extend to any servant who shall be retained or employed bona fide for the purposes of husbandry or manufactures, or of any trade or calling by which the master or mistress of such servant earn a livelihood or profit." The fact that such a proviso was thought necessary shews that the Legislature recognized that the language of s. 1 would prima facie include all the servants there named, whether employed in private houses or in trade. When we come to the Act of 1803 (43 Geo. 3, c. 161), Sched. C, the general trade exemption has disappeared, and a limited trade exemption is given at the end of the schedule in these terms: "Exemptions from the last mentioned duties as set forth in Schedules C, No. 1, 2, 3, and 4." "1. The said duties not to be payable by any person who shall have retained or employed bona fide any male servant solely for the purposes of husbandry or manufacture, or of any trade or calling by which the master or mistress of such servant shall earn a livelihood or profit, and who hath not at any time or occasion, or in any manner, or for any purpose, been employed in any of the capacities enumerated in Schedules (C) No. 1 and 2." Rule 1 of

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Sched. C, No. 1, corresponds to s. 1 of the Act of 1777. The words "and who hath not" must be read to mean "and where the servant hath not." So read, the exemption clause means that if a male servant is employed in any capacities other than those mentioned in C, No. 1, and is so employed solely for purposes of trade, he shall be exempt from taxation. But that clearly shews that unless the servant satisfies both conditions he is not exempt, and that if he is employed in one of the capacities mentioned in C, No. 1, he is taxable notwithstanding that he is employed solely for purposes of trade, for otherwise what possible meaning can be given to the words "and who hath not at any time, &c."? The same limited trade exemption in precisely the same terms is to be found in the Act of 1812 (52 Geo. 3, c. 93). It is true that both in the Act of 1803 and also in that of 1812 in Sched. C, No. 1, r. 2, it is provided that the duties shall extend to all servants employed by innkeepers except hostlers and waiters, and in r. 6 it is provided that the duties shall under certain circumstances extend to a person employed in the capacity of coachman or groom, "although such person shall have been retained for the purposes of husbandry or any manufacture or trade"; and if the Crown's contention as to the wide operation of r. 1 is correct, those provisions would appear to be superfluous. But it may be that they were inserted ex abundanti cautela, and in any case cannot be regarded as overriding the inference to be drawn from the exemption clause at the end of the schedule. In 1853, in 16 & 17 Vict. c. 90, Sched.C, even the limited trade exemption disappeared. But the language of r. 1 retained the wide general meaning that it had under the Act of 1812, and applied to servants employed in trade as well as in private houses. By r. 3 of that schedule waiters are for the first time made taxable. They are not put in the general list of servants, but dealt with in a rule by themselves. But the duty only extends to waiters employed to wait on guests in licensed houses, eating-houses or lodging-houses. In the present Act, 32 & 33 Vict. c. 14, s. 19, there is equally no general trade exemption. There are three specific exemptions of servants employed in trade, namely, the servant of a person licensed to sell intoxicating liquors, where only one servant is employed, coachmen and stable helpers

employed by livery stable keepers, and coachmen and stable helpers employed by owners of stage and hackney carriages. But those exemptions point the general rule that the fact of being employed in trade affords no exemption. The exemption of an innkeeper's sole servant clearly implies that he is liable if he keeps more than one. But there is nothing in the Act which makes him so liable unless it is the general language in sub-s. 3. With regard to waiters, it is to be observed that they are no longer dealt with in a separate rule, but are placed in the general list of taxable servants without any qualification as to the class of house in which they are employed. There is nothing in the language of the present Act to prevent the expressions "house steward," "cook," or "waiter" including the servants of the appellants here in question, and they are therefore taxable. It is said that the Act was only intended to apply to luxuries. But in s. 18, the section which imposes the duty on male servants, a duty is also imposed on horse dealers, whose calling is obviously a trade, and not a luxury.

Shearman, K.C., in reply.

LORD ALVERSTONE C.J. The Act upon the construction of which the question in this case turns is a taxing Act, and, being so, must in my opinion be construed strictly, and the onus lies upon the Crown to shew that the persons whom it is sought to tax fall clearly within its operation. The argument that has been addressed to us by the Attorney-General was based upon the fact that the Act omits the express exemption in favour of servants employed for purposes of trade which was to be found in the original taxing Act of 1777. But that argument is not, in my opinion, sufficient to support the Crown's contention. In the first place, the general exemption of trade servants had disappeared from the statute-book by the year 1803, in which year the Act of 43 Geo. 3, c. 161, was passed. That Act contains no general trade exemption in express terms. But when one comes to examine the rules for charging the duties under that Act, it becomes obvious that the language of r. 1 could not have been intended to apply to servants of the kinds there specified if employed in trade or manufacture, for otherwise r. 2 would be

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wholly unnecessary. That rule provides that the duties "shall extend to all servants of the capacities before mentioned employed in taverns, coffee-houses, inns, alehouses, or any other houses licensed to sell wine, ale, or other liquors by retail," a provision which would be superfluous if r. 1, which enumerates the classes of taxable servants, bore the wide meaning suggested. The Act was in the nature of a sumptuary law intended to tax luxuries. The servants mentioned in r. 1, such as "maître d'hotel, house steward, ... valet de chambre, butler, under butler, clerk of the kitchen, confectioner, cook, house porter, footman," are all in the nature of luxuries; and to my mind the reason why keepers of inns and hotels, &c., were expressly made liable to the tax was because the Legislature recognized that in such houses there were servants employed in capacities similar to those above mentioned for the purpose of ministering to the wants of the guests. And it was presumably upon the same ground that in *Solomon* v. *Cropper* (1) a man employed as the steward of a club was held to be taxable under the present Act. The members of a club in the aggregate enjoy at their club luxuries and privileges similar to those which they would have in their own houses. The general trade exemption which was omitted in the Act of 1803 was never re-enacted in any subsequent statute. But the statutes which have intervened between 1803 and 1869 have all been open to the observation that, like the Act of 1803, they contain clauses expressly extending the duties to certain classes of servants employed in trade, such as innkeepers' servants, from which it is to be implied that they would not have been liable to taxation merely by reason of the omission of the trade exemption. Under those circumstances, when I come to the Act of 1869 I cannot bring myself to think that the mere absence of an express exemption of trade servants in that Act shews an intention upon the part of the Legislature to tax such servants generally. If there had been such a general exemption clause in an Act in force within a reasonable distance of time before 1869, and that clause had been suddenly dropped in the Act of 1869, or in an Act passed shortly before that date, the case for the Crown would have been very much stronger. But there is

(1) (1898) 79 L. T. 301.

nothing of the kind to be found. The Act of 1812 was repealed by the Act of 1853 (16 & 17 Vict. c. 90), which re-enacted the schedules with some slight alterations. Therefore I come to the conclusion that the mere fact that the term "male servant" is defined in the Act of 1869 to include "house steward," "cook," and "waiter" does not justify the inference that it was intended to tax servants employed in those capacities in connection with a trade by which the master earns a livelihood or profit. Here the appellants employ the men in question solely for the purposes of their trade. Therefore, in my opinion, they were not liable to the tax in respect of any of the servants charged, and the conviction should be set aside. But, with regard to the thirty persons charged as waiters, I am further of opinion that, even if the Act does apply to servants employed in any of the capacities mentioned in s. 19, sub-s. 3, for purposes of trade, these men do not fall within the term "waiters" in the sense in which that term is used in the section. Waiters were not originally in the list of taxable servants, and were for the first time brought within it by the 16 & 17 Vict. c. 90, Sched. C, r. 3, in connection with taverns, inns, coffee-houses, &c., and waiters of that class spend practically the whole day waiting upon the guests at table. In the subsequent Act of 1869 waiters are mentioned generally without reference to taverns, &c. But it was presumably not intended thereby to give the term a wider signification, and it must be taken to still mean a servant whose substantial duty is only to wait at table. But here, in the case of the appellants' servants', waiting at table forms but a very small part of their duty. The mere fact that they do a little waiting will not constitute them waiters. And I do not think that in any point of view they are waiters within the meaning of the section.

A. T. LAWRENCE J. I am of the same opinion, and for the same reasons.

SUTTON J. I agree.

Judgment for the appellants.

Solicitors for appellants: *Lloyd-George & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. F. C.

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Jan. 22, 23, 24.

MAJOR BROTHERS *v.* FRANKLIN & SON.

Trade Mark—Proprietor—Salesman on Commission—Natural Product—Selection—Certification—Dealing with—Offering for Sale—Infringement—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 3.

A salesman on commission may be the proprietor of a trade mark in respect of the goods which he sells on commission.

A trade mark may be registered in connection with vegetables and other natural products of the earth.

The plaintiffs were salesmen of vegetables on commission in Covent Garden Market. They dealt largely in the vegetables of a grower named Webb, on whose care and skill in selecting, grading, and packing they knew they could rely. They registered a trade mark under classes 42 and 50 in Sched. III. to the Trade Marks Rules, 1890, and painted the same upon the baskets in which they sold the vegetables. Their practice was to send baskets with their trade mark upon them to Webb, who filled the baskets and forwarded them by rail to the plaintiffs. The plaintiffs' trade mark was well known, and goods sold by them under that mark had a high reputation in the market.

Owing to a dispute between them and the railway company the plaintiffs refused to take delivery of nine baskets forwarded by Webb as aforesaid. The railway company then procured the defendants under an indemnity to sell in the market the contents of the nine baskets. The defendants sold the contents in or from the baskets themselves:—

Held, that the vegetables so sold by the defendants were the goods of the plaintiffs by virtue of selection, certification, dealing with, or offering for sale within the meaning of s. 3 of the Trade Marks Act, 1905; that there was nothing to prevent the plaintiffs from registering a trade mark in connection with those goods, and that the defendants had committed an infringement of that trade mark.

Trial of action before Jelf J. without a jury.

The plaintiffs were salesmen in Covent Garden Market, where they sold fruit and vegetables, partly of their own growing and partly that of a grower named Webb, who carried on his business near Biggleswade, and for whom they sold the goods on commission, remitting to him after the sale the price obtained less the commission and the cost of carriage. The plaintiffs had acquired a high reputation in the market for dealing only in good vegetables of different classes, and the fact that, as regards goods sold by the plaintiffs on commission, the goods had passed through their hands and were sold by them, gave a special value to the goods in consequence of the confidence placed by buyers

in the judgment and skill of the plaintiffs. They had gained this reputation mainly by selecting such a grower as Webb, who shewed care and skill in selecting, grading, and packing these goods. The practice was for the plaintiffs to send to Webb a number of baskets or other receptacles belonging to themselves on the understanding that Webb was to fill them with his vegetables and forward the goods in these baskets to the plaintiffs, who then sold them in the market as if they were their own goods to customers, although, as between the plaintiffs and Webb, they were Webb's goods and the plaintiffs were only selling them on commission for Webb. As a rule the plaintiffs accepted without examination the goods sent by Webb, but they had the right to inspect them, and, if they found them of bad quality, or badly graded or badly packed, to reject them and refuse to sell them for Webb. They had never in fact refused to sell what Webb had forwarded.

In order to protect the reputation of the goods in which they dealt, the plaintiffs on October 26, 1903, registered under the Trade Marks Acts, 1883 to 1888 (now repealed and replaced by the Trade Marks Act, 1905), a trade mark, "MAJO," consisting of the first four letters of their own name, under classes 42 and 50 (10.) in Sched. III. to the Trade Marks Rules, 1890. This trade mark was painted or stencilled under the full name which appeared upon the plaintiffs' baskets in large letters, and, as applied to the goods in the baskets, the mark was well known in the market, and this mark and, in a less degree, the name "Major," shewed to the public that the goods in the baskets had been dealt with and sold by the plaintiffs.

On June 26, 1906, Webb, in accordance with the practice above mentioned, consigned eight of the plaintiffs' baskets filled with carrots and one filled with parsley to the plaintiffs at King's Cross Station. A dispute arose between the plaintiffs and the Great Northern Railway Company as to the delivery of these goods, in consequence of which the plaintiffs refused to accept delivery of them from the railway company, and in the result, with the concurrence of Webb, the Great Northern Railway Company requested the defendants, who were also salesmen in Covent Garden Market, to sell the goods in these nine baskets,

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as they were perishable goods, which embarrassed them and incumbered their premises. This order the defendants accepted on an indemnity being given by the railway company saving the defendants harmless for the consequences of acting upon the request of the railway company. The defendants, in compliance with the request of the railway company, on June 28 sold in the market the whole of the contents of the nine baskets. As to the contents of three of the baskets, they were sold as they stood in the plaintiffs' baskets; the rest were sold in portions out of the other six baskets. The nine baskets all had clearly painted upon them the name of the plaintiffs and their trade mark, "MAJO." With regard to the three baskets mentioned above, the baskets themselves, though delivered under the contract of sale, were not included in the sale, but, according to the practice in the market, were allowed to be taken away by the buyer of the contents on payment of a deposit of one shilling per basket, which was to be returned on the return of the basket. Two of these baskets were so parted with to an agent of the plaintiffs; the third was so parted with to a third person. Ultimately and before action all the nine baskets were returned by the defendants to the plaintiffs. There was evidence that in practice when salesmen in the market found their own goods, or goods which they were entitled to sell, in the baskets of other salesmen, they transferred the goods before sale into baskets of their own and returned the baskets of other salesmen to their owners.

There was no evidence of the quality of the contents of these nine baskets; none of them had in fact passed through the hands of the plaintiffs or been examined or dealt with or sold by them.

The plaintiffs brought this action against the defendants for infringement of their trade mark, claiming damages and an injunction.

Walter, K.C., and *Kerly*, for the plaintiffs.

At the close of the plaintiffs' case JELF J. called upon

Ernest Pollock, K.C., and *Cautley*, for the defendants. The plaintiffs, being mere agents for Webb for the sale of his

vegetables, cannot claim any trade mark in connection with those goods. The goods are not the goods of the plaintiffs by virtue either of manufacture, selection, certification, dealing with, or offering for sale within the meaning of s. 3 of the Trade Marks Act, 1905. The person indicated by that section is Webb. He it is who selects, deals with, and offers for sale the goods in question.

Secondly, assuming that the plaintiffs, though mere agents for sale, are persons who could have a trade mark, the goods in question, being simply the natural product of the earth, unprepared and unaffected by any work or labour expended upon them, are not the subject of a trade mark.

Thirdly, even if the plaintiffs are entitled to this trade mark to protect these goods, there has been no real infringement by the defendants. This is not a case where goods other than the plaintiffs' have been sold under their trade mark. The goods sold under the trade mark are the goods which the plaintiffs intended should be so sold.

Walter, K.C., in reply. The goods are the goods of the plaintiffs by virtue of selection, dealing with, and offering for sale. The fact that the plaintiffs sell goods produced by Webb is immaterial. They sell in the market as principals. In selecting a grower they select his vegetables, and they deal with and offer for sale those goods. Further, by offering them for sale they certify that the goods are of a superior quality.

There is nothing to prevent a trade mark from being applied to natural products. Class 42 in the Third Schedule to the Trade Marks Rules, 1890, includes "substances used as food," which cannot be said to exclude vegetables. Class 46 includes "seeds for agricultural and horticultural purposes," which are as much natural products as carrots and parsley.

The goods sold by the defendants had not in fact been offered for sale by the plaintiffs. The sale of them under the plaintiffs' trade mark involved a representation that they had been so offered. That was an infringement of the plaintiffs' trade mark.

JELF J. This is an action brought mainly to restrain the defendants from an alleged infringement of the trade mark of the

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plaintiffs, and also for damages for passing off goods as the plaintiffs' goods, and for conversion of certain baskets of the plaintiffs. The claim in respect of passing off was not pressed, and the really important part of the case is that which has reference to the alleged trade mark.

The plaintiffs contend that the defendants have infringed their trade mark by selling goods marked with that trade mark which have not passed through the plaintiffs' hands and have not been dealt with by the plaintiffs. The defendants contend, first, that a salesman on commission cannot in law have a trade mark under the Trade Marks Act, unless he himself does something to the goods, such as selecting or grading, which, they say, has not been done by the plaintiffs in this case. In answer to this contention the plaintiffs refer to s. 3 of the Trade Marks Act, 1905, which provides as follows: "In and for the purposes of this Act, (unless the context otherwise requires) a trade mark shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." The plaintiffs say that they are the proprietors of the trade mark, and they agree that they have to shew that the goods in respect of which they require to use this trade mark are their goods; but that, they argue, means not their property absolutely, but their goods by virtue of manufacture, selection, certification, dealing with, or offering for sale; and they say that although these goods, being carrots and parsley, are clearly not their manufacture, and although they have not been in this particular case actually selected by them in the sense of being placed before them, the good chosen and the bad rejected, nevertheless they are their property in that qualified sense which is intended by this section by virtue of selection. They contend that it is a selection to get the goods in the best and most reliable market from the best gardens and growers. To select a grower like Webb, in whose skill and care they can place confidence, and to procure goods from him, this, they say, is to select the goods within the meaning of the Act, and consequently the goods are theirs by virtue of selection. Then they say that the goods are

theirs by virtue of certification, because by sending these goods out with their trade mark they certify that, although they are of different classes, nevertheless they all come under the category of good articles which can be relied on.

The plaintiffs further contend that at any rate they are their goods by virtue of dealing with them or offering them for sale. It seems to me that there is a great deal in that contention, because if a man can get an ownership of goods for the purpose of this statute by dealing with them or offering them for sale, that puts an end to the contention that a salesman who has not got the whole property in the goods, but is merely selling them on commission, cannot get the benefit of a trade mark such as this is. I asked whether there was any case to establish this contention, and I was told that there was not; but it was argued that this Act of Parliament consolidates the law, that it sums up the cases and sanctions the practice of past years, and that it must be taken to enact that this qualified property in the goods is sufficient for the purpose of registering a trade mark used in connection with them. On consideration, I think that this is the true view of the Act. If that is so it is an answer to the defendants' first contention. I desire to add that it would impose an unnecessary and unwarrantable restriction upon the Act to hold that a salesman, who to all intents and purposes is a principal as regards the purchaser, and who can only be treated as an agent for an undisclosed principal by purchasers who happen to know that he is in fact selling for a third person, cannot have in the market a protection of the kind claimed in this action.

Secondly, the defendants contended that a trade mark could not be used in connection with natural products which have not been treated in some way, whether by being graded or selected or otherwise dealt with and manipulated, by the person claiming the benefit of the trade mark. Turning to the Third Schedule to the Trade Marks Rules, 1890, I find an expression to the effect that the definitions therein are not exhaustive. The following words occur: "Classification of goods. Illustrations. Note, Goods are mentioned in this column by way of illustration and not as an exhaustive list of the contents of a class." Then, turning to class 42, I find

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this: "Substances used as food, or as ingredients in food such as cereals, pulses, olive oil, hops, malt, dried fruits, tea, sago, salt, sugar, preserved meats, confectionery, oil cakes, pickles, vinegar, beer clarifiers." I do not find in that particular class anything exactly like goods picked off a tree, or goods which come up from the soil and which are merely taken and sold; but if one looks at clause 46 one finds "seeds for agricultural and horticultural purposes." Now no one can deny that seeds are a natural product with which man has nothing to do beyond preparing the ground to receive them, sowing them, and selecting them when grown. No more and no less is done to the vegetables which are the subject of this action. If seed is the subject-matter of a trade mark, I see no difficulty in applying the Act to other natural products; but even if it were necessary that something should be done to the natural product by the person who claims the trade mark, the fact of selection, getting from the best ground, and from the best growers who till the ground, the natural product, and then producing that in the market is, in my opinion, sufficient to give that person a right to have the goods of his selection protected by a trade mark; and I have come to the conclusion that the plaintiffs are right in saying that there is no such restriction to be put upon this Act, and upon the rights of the parties under it, as is suggested on the part of the defendants, and that such a restricted construction would limit more than was intended by the Legislature the effect of a beneficial statute.

Then, thirdly, it was contended on the part of the defendants that there was in this case no infringement of the trade mark by the defendants, because the contents of the nine baskets sold by the defendants were the contents which the plaintiffs intended to be sold under their trade mark, namely, the goods of the grower Webb. The answer of the plaintiffs is that they might indeed, if the goods had come to them, have passed them because they came from Webb, and because of their confidence in him, without any examination; but if they had chosen to examine them they could have examined them, and if they found that they were not good in quality, grading, packing, or in any other respect, they could have rejected them and refused to sell them; that the

defendants by selling under the plaintiffs' trade mark have made a representation which is untrue in fact, namely, that these goods had been dealt with, selected, and sold by the plaintiffs, a representation which gave a particular value to the goods. In my view it does not matter that in a particular case, or in any number of cases, the plaintiffs did actually accept the goods of Webb without examination. I think it is quite a sufficient infringement to make by the use of this trade mark a representation which was not true, and which gave an additional value to the goods.

Under all these circumstances I come to the conclusion that all these defences fail. The plaintiffs are entitled to the benefit of this trade mark, and it has been infringed by the defendants. That being so, if the defendants had merely set up that they had acted inadvertently, and without any wrongful intention, which I am inclined to think is the case, that no real damage had been done, and that no particular principle was involved, I should have been inclined to award merely nominal damages, and I should have hesitated very much before I granted an injunction, or even awarded costs; but as it is evident from the conduct of the case before me that the Great Northern Railway Company are really defending the action and seem desirous of disputing and defeating the plaintiffs' trade mark, I infer that unless restrained by the Court the same thing may be done again in similar circumstances. This trade mark has been attacked in every possible way with every argument that could be put forward, and under these circumstances I do not feel at all inclined to treat this as a trivial or inadvertent infringement. The action has been chosen as a ground on which to deliver a general attack on the plaintiffs' rights. Under these circumstances I think I am bound to grant an injunction, as prayed in the statement of claim, to restrain the defendants and each of them, their and his servants and agents, from infringing the trade mark of the plaintiffs.

Judgment for the plaintiffs with costs.

On the application of *Kerly* the learned judge certified under s. 46 of the Trade Marks Act, 1905, that the validity of the registration of the plaintiffs' registered trade mark had come in

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question in this action, and had been decided in favour of the plaintiffs, the proprietors of such trade mark.

Solicitors for plaintiffs: *John C. Button & Co.*

Solicitor for defendants: *R. Hill Dawe.*

W. H. G.

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Dec. 7, 12.

SPIERS *v.* HUNT.

Contract—Breach of Promise of Marriage—Promise to Marry on Death of Wife—Knowledge of Promisee—Public Policy.

The defendant, who was to the knowledge of the plaintiff a married man, promised to marry the plaintiff on the death of his wife. He did so with the intention, known to the plaintiff, of inducing her to commit adultery with him, and she did so after the promise and before the death of the defendant's wife:—

Held, that such a promise was contrary to public policy, and could not be enforced.

FURTHER CONSIDERATION before Phillimore J.

The action was brought for breach of promise of marriage, and was tried at the Leeds Assizes before Phillimore J. and a special jury.

In February or March, 1899, the defendant, who was then about seventy years of age, and who to the plaintiff's knowledge was a married man, promised to marry the plaintiff (who was then aged thirty-one) on the death of his wife. Sexual intercourse between the plaintiff and the defendant began in March, 1899, and continued till March, 1904. In July, 1907, the defendant's wife died. The defendant refused to marry the plaintiff, and the plaintiff commenced this action.

The jury assessed the damages, in the event of the action being maintainable, at 150*l.*, and the further consideration of the case was adjourned to London.

Manisty, K.C., and *C. Mellor*, for the defendant. The promise to marry was, under the circumstances, against public policy, and cannot be enforced. The law will not sanction a contract the effect of which would be to incite a spouse to break the marriage

vow. This point was not taken in *Wild* v. *Harris* (1), and in *Millward* v. *Littlewood* (2) a promise to marry another woman made while the promisor's wife was alive was said to be inconsistent with the affection which ought to subsist between married persons. *Wilson* v. *Carnley* (3) was a similar case, and there Channell J., and subsequently Lord Coleridge, K.C., as commissioner of assize, held that public policy did not bar the plaintiff's claim in every case of a promise being made during the life of the spouse. Here, however, the existence of immoral relations between the plaintiff and the defendant shew the danger of such a position, and it would clearly be against public policy to enforce this contract: *Egerton* v. *Brownlow* (4); *In re Missouri Steamship Co.* (5); *Gilbert* v. *Sykes* (6); *Hartley* v. *Rice.* (7) A marriage settlement which contemplated separation has been held to be void: *Cartwright* v. *Cartwright* (8); *H.* v. *W.* (9); *Woodhouse* v. *Shepley.* (10) If a contract is against the general moral law it will not be enforced: *Printing and Numerical Registering Co.* v. *Sampson.* (11)

T. Hollis Walker, as amicus curiæ, referred to *Paddock* v. *Robinson* (12); *Davis* v. *Pryor* (13); *Haviland* v. *Halstead* (14); *Noice* v. *Brown.* (15)

G. F. Mortimer, for the plaintiff. The law presumes that the consideration for a promise is a legal one, and it does not appear in this case that the promise was made in consideration of immoral relations existing between the parties. Seduction may be pleaded in aggravation of damages: *Millington* v. *Loring* (16); *Berry* v. *Da Costa.* (17) The Court ought not to take into consideration questions as to the tendency of a contract, but must have regard only to the actual effect of the particular contract. In *Ramloll Thackoorseydas* v. *Soojumnull Dhondmull* (18)

(1) (1849) 7 C. B. 999.
(2) (1850) 5 Ex. 775.
(3) (1907) 23 Times L. R. 578, 757; see S. C. in C. A. p. 729, post.
(4) (1853) 4 H. L. C. 1.
(5) (1889) 42 Ch. D. 321.
(6) (1812) 16 East, 150.
(7) (1808) 10 East, 22.
(8) (1853) 3 D. M. & G. 982.
(9) (1857) 3 K. & J. 382.
(10) (1742) 2 Atk. 535.
(11) (1875) L. R. 19 Eq. 462.
(12) (1871) 14 Amer. Rep. 112.
(13) (1901) 112 Fed. Rep. 274.
(14) (1866) 34 N. Y. 643.
(15) (1876) 20 Amer. Rep. 388; 23 Amer. Rep. 213.
(16) (1880) 6 Q. B. D. 190.
(17) (1866) L. R. 1 C. P. 331.
(18) (1848) 6 Moo. P. C. 300.

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some doubt was expressed by Lord Campbell as to *Gilbert* v. *Sykes*. (1) The idea of looking at the tendency of contracts was questioned in *Egerton* v. *Brownlow* (2) and *Janson* v. *Driefontein Consolidated Mines, Ld.* (3) The law recognizes separation agreements contemplating the separation of a married couple: *In re Hope Johnstone* (4); *Cartwright* v. *Cartwright* (5); *In re Crawford's Settlement*. (6)

Manisty, K.C., in reply. Both the tendency and the effect of this particular contract was that the plaintiff cohabited with the defendant until the death of the defendant's wife.

Cur. adv. vult.

Dec. 12. PHILLIMORE J. read the following judgment:—This case was tried before me at Leeds. The plaintiff, a single woman, sues for breach of promise of marriage alleged to have been made by the defendant either on February 11 or March 11, 1899. The plaintiff was then aged about thirty-one; the defendant was said to be then aged about seventy, and was to the plaintiff's knowledge a married man, his wife being a little older than himself, an invalid and subject to heart complaint in a form which, it was anticipated, would lead to an early and sudden death. She did not, however, die till July 11, 1907. Sexual intercourse between the plaintiff and the defendant began about March, 1899, and continued till March 10, 1904. During this time three children were born, the paternity of whom the defendant now admits. As to a fourth child, born in June, 1904, he has not in terms admitted paternity, but upon affiliation proceedings an order was made against him. After March 10, 1904, the defendant quarrelled with the plaintiff, and in order to support her children she had to take proceedings in the county court, before magistrates, and in the High Court. Finally, a compromise was entered into on November 21, 1904, in accordance with which the plaintiff received a sum of money for her children and released all her claims, at any rate in respect of her children.

(1) 16 East, 150.
(2) 4 H. L. C. 1.
(3) [1902] A. C. 484.
(4) [1904] 1 Ch. 470.
(5) 3 D. M. & G. 982.
(6) [1905] 1 Ch. 11.

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On the death of the wife the plaintiff required the defendant to fulfil his promise to marry her, and he refused. These facts being proved, counsel for the defendant called no witnesses, but raised two defences—first, that the release in the deed of November 21, 1904, operated to discharge the promise to marry; and, secondly, that the contract was one against public policy and morals and not to be enforced by law. With the consent of the parties I asked the jury to assess damages in the event of the action being maintainable, and they assessed them at 150*l*. They were then discharged, and it was agreed that I should determine the rest of the case upon the evidence already given, having power to draw inferences of fact.

With some hesitation I decided that the release did not discharge the plaintiff's claim, and I reserved the other part of the case for further consideration in London.

I have been greatly assisted by the arguments of counsel on both sides and their research into the authorities. The question I have to determine is whether the contract is one which the law will lend itself to enforce. Prohibited or illegal contracts will, of course, not be enforced by law; but there are also contracts not illegal and not prohibited which nevertheless the law deems it inexpedient to enforce. The distinction is well pointed out in *In re Missouri Steamship Co.* (1), particularly in the judgment of Fry L.J. It is enough for the defendant if this contract can be brought within the class of contracts which the law deems it inexpedient to enforce. When mutual promises to marry are exchanged between two persons and one of them is married, and that fact is not known to the other, an action by the party who is single for damages for non-fulfilment of the promise may well be maintained, and maintained even while the other party remains married (as was the case in *Wild* v. *Harris* (2) and in *Millward* v. *Littlewood* (3), and as was suggested to be the case in *Davis* v. *Pryor* (4)), not upon the footing that the defendant could fulfil the contract and had failed to do so, because the contract could not have been fulfilled before the action was brought, but upon the ground of estoppel or warranty of capacity.

(1) 42 Ch. D. 321.
(2) 7 C. B. 999.
(3) 5 Ex. 775.
(4) 112 Fed. Rep. 274.

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That case is different from the one before me. In the one before me both parties knew that the man was married, and that they could not marry until the wife died or there was a divorce. Upon consideration I have come to the conclusion that in general such a contract as this is against public policy and morals, and not to be enforced. It is, in my opinion, within the language of Sir George Jessel in *Printing and Numerical Registering Co.* v. *Sampson* (1), as a contract which will induce one of the parties to do something against the general rules of morality; or, as it is expressed by Lawrence C.J., of Illinois, in the American case of *Paddock* v. *Robinson* (2), to hold it valid would be to introduce into social life a dangerous and immoral principle. As that learned judge says: "Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a Court of justice." How strongly the English law discountenances any arrangement which will tend to produce separation between husband and wife is shewn by the case of *Cartwright* v. *Cartwright*. (3) I am afraid of making this judgment too long, or I would textually quote the language of Knight Bruce L.J. The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to crime. Its very probable result is sexual immorality. Counsel for the plaintiff suggested that when one knew the actual results one need not consider probable results or tendencies, and that it appeared from the evidence that the husband had not neglected his wife.

(1) L. R. 19 Eq. 462, at p. 465. (2) 14 Amer. Rep. 112.
(3) 3 D. M. & G. 982.

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I have never before heard of the suggestion that the legal force of a contract was to be tested by its actual results; but if I were so to test this contract the consequence would be disastrous to the plaintiff. If I am to believe her evidence implicitly, it led to her seduction. In any event, it led to the birth of children and to constant intercourse for five years, with joint holiday trips, on some of which the woman wore a wedding ring and passed as the wife. The institution of the family is the basis of the civilized state, and law should and does encourage the closest relations between husband and wife and discourage every transaction the tendency of which is to give the husband another woman to care for as well as or instead of his wife, or a wife another man to care for as well as or instead of her husband. My brother Channell, in *Wilson* v. *Carnley* (1), thought that there might be cases in which there would be no mischievous tendency, or not so much mischief, and he instanced cases in which the other consort was an incurable lunatic, or where the promise was made at the death-bed and upon the request of the dying consort, and therefore he declined to decide as a matter of law that such a promise could never be enforced. I have not to deal with such cases, and my decision does not necessarily cover them. It may be that the rule is general, but not universal. Where there is confirmed lunacy there may be no injury to the lunatic consort, but there remains the objection of probable sexual immorality. In the other case, if the consort be indeed on a death-bed, there is no palpable danger; but, as Best C.J. said, when it was attempted for other purposes to insist upon approaching death as creating a peculiar legal position, it would be difficult to establish a rule which would settle the degree of approaching death, and more difficult to ascertain by evidence when the case was within that degree: *Fox* v. *Bishop of Chester*. (2) Having tried to look at this case upon principle, I now come to the authorities. In *Wild* v. *Harris* (3) and *Millward* v. *Littlewood* (4) the woman sued, the man was married, and the woman did not know it. The judgment of the Court of Common Pleas in *Wild* v. *Harris* (3) rested upon this fact, though there are passages in

(1) 23 Times L. R. 578.
(2) (1829) 6 Bing. 1.
(3) 7 C. B. 999.
(4) 5 Ex. 775.

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the judgment and interlocutory remarks which seem to shew that in the opinion of Wilde C.J. and Cresswell J. the action might have been maintained even if the woman had known that the man was married. This opinion seems to have been partly founded upon a case in the Year-books, which I will deal with later. In *Millward* v. *Littlewood* (1) in the Exchequer the Court followed the previous decision of the Court of Common Pleas, Pollock C.B. strongly dissenting from it, Alderson B. and Parke B. thinking the particular decision right, and Parke B. referring to the case in the Year-books as possibly making the ignorance of the woman unimportant. I have gone somewhat carefully into the case in the Year-book, reported in Lib. Ass. 40 Edw. 3, pl. 13, and quoted in Brooke's Abridgment, tit. "Condicions," fol. 152, pl. 119, Rolle's Abridgment, tit. "Condition," p. 419, and in Fitzherbert's Natura Brevium (1794 ed.), p. 205 H. A woman infeoffed a man upon condition that he should take her to wife. He was married. He infeoffed B., who infeoffed C., who infeoffed D. The man died, whether still married or not is not said, and then the woman, sixteen years afterwards, entered upon the land in the hands of D., because the man had not married her and the condition was broken. D. sued her for this entry, but it was held that it was a good condition and that she was justified. The reporter or collector of the reports in the Year-book adds a query, because it seemed to him that the condition was void because the man was already married. This query was repeated in Rolle, but not in Brooke or Fitzherbert. The judges who referred to this case seemed to have assumed that the woman knew that the man was married before she infeoffed him, but this knowledge is not averred, and I see no reason why it should be inferred. On looking into Fitzherbert I find that such infeoffments were common. They formed a kind of imperfect marriage settlement. So common were they, and so not uncommon was it for the woman to have been too hasty and marriage not to follow after all, that there was a recognized writ causa matrimonii prælocuti, by which she could recover her land if marriage did not take place, of which writ Fitzherbert gives several instances, this case being one.

(1) 5 Ex. 775.

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The only other English authorities are the decision of my brother Channell in *Wilson* v. *Carnley* (1) and a decision of my brother Coleridge (2), sitting as commissioner before he was raised to the Bench upon the same case after trial. As to this latter decision, I may observe that I do not think that Coleridge J. intended to do more than follow Channell J., having come to the conclusion that the facts in the particular case brought it under the protection of the saving clause in the judgment of Channell J. The American authorities, on the other hand, are precise and to the point, and adverse to the plaintiff. It appears from a note to *Paddock* v. *Robinson* (3) that they had already followed the English decisions in cases where the woman was ignorant that the man was married, and in *Paddock* v. *Robinson* (3) the Supreme Court of Illinois also expressed approval of these decisions. But, as in *Paddock* v. *Robinson* (3) each party knew that the other was married, and nevertheless promised to marry the other when they were free, the Court refused to sanction an action for breach of promise, the Chief Justice expressing the opinion of the Court in the language I have already quoted. In *Davis* v. *Pryor* (4) the Circuit Court of Appeals came to the same conclusion. There an unsuccessful attempt was made to prove that the woman did not know. In *Noice* v. *Brown* (5) the same principle was applied in a case where the promise was to marry when the previous marriage should be put an end to by a divorce, a suit for which was then pending. I might well adopt the language of the Chief Justice in that case, language approved by the Chancellor upon appeal: "It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship,

(1) 23 Times L. R. 578.
(2) 23 Times L. R. 757.
(3) 14 Amer. Rep. 112.
(4) 112 Fed. Rep. 274.
(5) 20 Amer. Rep. 388; 23 Amer. Rep. 213.

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in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion." While this judgment has been in preparation, Mr. Castle, K.C., has furnished me with a reference to the opinion of Grotius on this subject in his chapter on promises. I take the passage as given in Whewell's translation: "But in such cases also, the civil law is wont to make many things void for the sake of utility which by natural law would be obligatory; as a promise of future marriage made by a man or woman who has a spouse alive; and not a few things done by minors or sons of families": De Jure Belli et Pacis, bk. 2, ch. 11, s. 8, sub-s. 3. If there is no universal rule and each case depends upon particular circumstances, and I am wrong in thinking it should be the general rule to disallow such actions, and the exception to allow them, and the presumption is the other way, still I think that this particular action cannot be maintained. According to the plaintiff's evidence the man began by complaining of the hardship of his life with an invalid wife, spoke of her approaching death, promised marriage, and then seduced the plaintiff. The dates run very close. She gave two dates for the promise, and the later was March 11, and she admitted that sexual intercourse began some time between March and June. She said—I quote her words—"It was because of his promise to marry me that I allowed him to have intercourse. I allowed him to have intercourse because he promised to marry me on his wife's death." I am permitted to draw inferences of fact, and my view is that the man only promised her marriage in order to gain immediate possession of her person, and that she knew that this was his object. If this be the right view of the facts I have the concurrence of my brother Channell, who was in commission with me at Leeds, in holding that the action could not be maintained. The defendant has behaved ill, and if he, being a rich man, makes no further provision for his admitted children he will behave very ill. But between these parties I must give judgment according to law, and therefore I must direct a verdict to be entered for the defendant, with the

consequence that there must be judgment for the defendant, with costs.

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Judgment for the defendant.

Solicitors for plaintiff: *Thomas & Malkin, Stockton-on-Tees.*
Solicitors for defendant: *T. M. Barron & Smith, Darlington.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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1908
Jan. 31.

Contract—Marriage—Breach of Promise of Marriage—Promise to Marry on Death of Wife—Knowledge of Promisee—Public Policy.

A promise of marriage made by a man, who to the knowledge of the promisee was at the time of the making of the promise married, is void as being against public policy, and therefore cannot be enforced by action after the death of the promisor's wife.

APPEAL from the judgment of Lord Coleridge, K.C., sitting as commissioner of assize, in an action for breach of promise of marriage tried by him with a jury.

At the time when the promise was made the defendant was, to the knowledge of the plaintiff, a married man. The defendant's wife having died, the defendant failed to perform the promise, and the action was thereupon brought.

The defence set up was that no action could be maintained upon such a contract as being against public policy.

The question whether the promise was void had been argued before Channell J. as a preliminary point of law, but he refused at that stage to hold that the contract was necessarily void (1), and the action accordingly went to trial.

The jury found a verdict for the plaintiff for 100*l.* damages. On further consideration the learned commissioner gave judgment for the plaintiff for the damages found by the jury.

Hugo Young, K.C., and *T. Hollis Walker*, for the defendant. An action for breach of promise of marriage cannot be

(1) See 23 Times L. R. 578.

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maintained against a defendant who, to the knowledge of the plaintiff, was a married man at the time of making the promise, because such a contract is void as being against public policy. It is obvious that such a contract is inconsistent with the relations which ought to subsist between a husband and wife, and in many cases might conduce to immorality. There is really no authority to the effect that such a promise is valid. *Wild* v. *Harris* (1), in the Court of Common Pleas, and *Millward* v. *Littlewood* (2), in which last-mentioned case the Court of Exchequer practically followed the decision of the Common Pleas, Pollock C.B. expressing dissent therefrom (3), are really no authorities for the present case, because there the plaintiff must be taken to have been ignorant of the fact that the defendant was a married man at the time when the promise was made. In that case the right of action may be regarded, not as depending on the validity of the contract to marry, but as arising from an implied warranty by the promisor of his ability to marry at the time of the promise: see per Parke B. in *Millward* v. *Littlewood*. (4) No such implication of a warranty could arise where, as in the present case, the plaintiff knew at the time when the promise was made that the promisor was a married man, and therefore unable to marry. There is a case in Lib. Ass. 40 Edw. 3, pl. 13, which was referred to in the cases of *Wild* v. *Harris* (1) and *Millward* v. *Littlewood* (2), but which really is no authority for the present purpose. In that case there appears to have been a feoffment by a woman on condition that the feoffee should take her to wife, he having a wife living at the time of the feoffment; and, the condition not being performed, the feoffor entered again upon the land, and her entry was adjudged lawful. But the reporter adds a note suggesting a doubt as to the correctness of the judgment, on the ground that the condition was void. This case appears to be referred to in Brooke's Abridgment, tit. "Condicions," fol. 152, pl. 119, and Fitzherbert's Natura Brevium (1794 ed.), p. 205 H, but the accounts

(1) (1849) 7 C. B. 999.

(2) (1850) 5 Ex. 775.

(3) The words are, "I am disposed to differ from the authorities which have been referred to": the Chief Baron appears to have thought that the question could be dealt with on principle only in a Court of error.—F. P.

(4) 5 Ex. at p. 778.

there given of it do not seem altogether to tally with the report in the Liber Assisarum. It is very difficult to ascertain exactly what was decided in that case, and from any point of view it does not seem to have much bearing upon the question raised by this appeal.

There has been a series of cases decided in the Courts of the United States, in which such a promise as this has been held void as being against public policy: see *Paddock* v. *Robinson* (1); *Davis* v. *Pryor* (2); *Kerns* v. *Hagenbuchle* (3); *Noice* v. *Brown* (4); *Haviland* v. *Halstead.* (5) In order to shew that a contract is void as being against public policy, it is not always necessary to shew that it is a contract to do something illegal: see *In re Missouri Steamship Co.* (6); *Printing and Numerical Registering Co.* v. *Sampson.* (7) The Court of Chancery has always treated contracts providing in futuro for a separation between husband and wife as unenforceable: see *Cartwright* v. *Cartwright* (8); *Marlborough* (*Duchess of*) v. *Marlborough* (*Duke of*) (9); *In re Hope Johnston.* (10) [They also cited *Hartley* v. *Rice* (11); *Gilbert* v. *Sykes* (12); *Egerton* v. *Brownlow* (13); *Swift* v. *Swift* (14); *Spiers* v. *Hunt.* (15)]

McCardie, for the plaintiff. In order that a contract, which is not a contract to do anything illegal, may be void as being against public policy on the ground of its immorality, it must have an obvious and direct tendency to immorality. It is not sufficient, in order to invalidate a contract, that it may produce a situation which, under certain circumstances, might involve a temptation to immorality; for instance, a contract by a young unmarried man to engage a young woman as a housekeeper might conceivably lead to immorality, but no one would suggest

(1) (1871) 14 Amer. Rep. 112.
(2) (1901) 112 Fed. Rep. 274.
(3) (1892) 60 N. Y. 222.
(4) (1876) 20 Amer. Rep. 388; 23 Amer. Rep. 213.
(5) (1866) 34 N. Y. 643.
(6) (1889) 42 Ch. D. 321, at p. 342.
(7) (1875) L. R. 19 Eq. 462, at p. 465.
(8) (1853) 3 D. M. & G. 982.
(9) [1904] 1 Ch. 165.
(10) [1901] 1 Ch. 470.
(11) (1808) 10 East, 22.
(12) (1812) 16 East, 150.
(13) (1853) 4 H. L. C. 1, at pp. 160, 161.
(14) (1865) 34 L. J. (Ch.) 394.
(15) Ante, p. 720.

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that such a contract would be void as being against public policy. There is no direct or necessary tendency to immorality in the case of a promise by a married man to marry a woman on the death of his wife, any more than in the case of any other engagement to marry. It has been said in many cases that the doctrine by which contracts, not illegal, are held to be void on the ground of public policy has been carried quite far enough, and ought not to be extended: see per Best C.J. in *Richardson* v. *Mellish* (1); per Alderson B. in advising the House of Lords in *Egerton* v. *Brownlow* (2); and per Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson*. (3) The Master of the Rolls said in the last-mentioned case that the rules which make a contract void as against public policy must not be arbitrarily extended, "because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by Courts of justice." It is submitted that at the present day it is hardly possible that the doctrine, by which contracts, not illegal, are held void as being against public policy, should be held capable of extension to fresh cases. The American cases are of no authority in this country: see per Lord Halsbury L.C., Fry L.J., and Cotton L.J. in *In re Missouri Steamship Co.* (4) The cases of *Wild* v. *Harris* (5) and *Millward* v. *Littlewood* (6) are authorities to shew that a promise such as this is binding, and not void.

[VAUGHAN WILLIAMS L.J. Would the doctrine of *Frost* v. *Knight* (7) be applicable in such a case? If the promisor were, after the making of the promise, and while his wife was still alive, definitively to repudiate the contract, could the promisee immediately sue for breach of the promise?]

It is contended that she could. The view originally taken in the Chancery cases with regard to separation deeds has undergone a great amount of modification. In early times the legal

(1) (1824) 2 Bing. 229, at p. 242.
(2) 4 H. L. C. 1, at pp. 106, 109.
(3) L. R. 19 Eq. 462, at p. 465.
(4) 42 Ch. D. 321, at p. 330.
(5) 7 C. B. 999.
(6) 5 Ex. 775.
(7) (1872) L. R. 7 Ex. 111.

view of marriage was affected by the religious idea, which invested it with peculiar sanctity as being a sacrament. The tendency of later times has been to regard it for legal purposes from a different point of view as being a civil contract: see Lush on Husband and Wife, 2nd ed. pp. 406-409; *Hunt* v. *Hunt* (1); *Besant* v. *Wood* (2); *Wilson* v. *Wilson*. (3) It is laid down in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (4) that the rules of public policy are capable of expansion and modification in accordance with the changes that may take place in public opinion and habits. In considering whether such a promise as this is contrary to public policy, the subject must be approached, not from the religious and ecclesiastical point of view, which formerly governed the idea of the status of marriage, but from the more modern point of view which has been taken in the later decisions as to separation deeds. If a married man has seduced a woman, and by way of reparation promises to marry her on the death of his wife, it would be a most lamentable thing that the reparation which he is really almost bound in honour to make should be avoided by the law: see observations of Brett L.J. in *Millington* v. *Loring*. (5)

T. Hollis Walker, for the defendant, in reply.

VAUGHAN WILLIAMS L.J. The question in this case is whether a promise made by a married man during the lifetime of his wife to marry some other woman, presumably after his wife's death, because he could not do so in her lifetime, can be enforced. It is convenient that I should state at the outset that in this particular case there is no question but that the plaintiff was perfectly well aware, at the time of the alleged promise, that the person who was promising to marry her was a married man. I do not state that as having, in my opinion, any bearing upon the decision of the abstract question whether a promise to marry a woman made by a married man in the lifetime of his wife can be enforced. It is, however, convenient that I should state that fact at once. I

(1) (1862) 4 D. F. & J. 221.
(2) (1879) 12 Ch. D. 605.
(3) (1848) 1 H. L. C. 538.
(4) [1893] 1 Ch. 630, pp. 661, 665.
(5) (1880) 6 Q. B. D. 190, at p. 196.

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myself have come to the same conclusion as that arrived at by Phillimore J., who states the result of his judgment in *Spiers* v. *Hunt* (1) in the following terms: "Upon consideration I have come to the conclusion that in general such a contract as this is against public policy and morals, and not to be enforced." I also am of opinion that such a contract is one which cannot be enforced: and, personally, I am of opinion that such a contract is one which ab initio cannot be enforced, and that it does not matter at what time or after the happening of what contingencies the action is brought, the contract being one which at no moment of time the Court would enforce. The plaintiff's counsel, in his able argument, felt that the position which he was taking up logically compelled him to say that this contract was one which ab initio could be enforced. He did not say that it was merely a contract for breach of which an action could be brought after the wife's death, and which could be enforced if the man refused to marry the woman after his wife was dead. He accepted the application to such a contract of the doctrine of *Frost* v. *Knight* (2), and the proposition that, if, within a short time after the promise was made, and during the lifetime of the wife, the husband, being impelled thereto by a sense of his disloyalty to his wife, or from some other cause, determined not to carry out his promise, and finally refused to perform his contract, if it was a valid contract at all, the person to whom the promise was given could bring an action to recover damages for breach of the contract during the wife's lifetime. That, I think, is the necessary and logical conclusion which follows from his argument. In my opinion such a contract is against public morality, and is void ab initio, and never at any time can be enforced in the Courts of this country. I agree with the view taken by Phillimore J. in that passage of his judgment in *Spiers* v. *Hunt* (1) where he says, in relation to a similar contract: "It is, in my opinion, within the language of Sir George Jessel in *Printing and Numerical Registering Co.* v. *Sampson* (3) as a contract which will induce one of the parties to do something against the general rules of morality." I am glad to think that, in addition to the valuable opinion of

(1) Ante, p. 720. (2) L. R. 7 Ex. 111.
(3) L. R. 19 Eq. 462, at p. 465.

Phillimore J., we have a confirmation of his words in the language used by Sir George Jessel. It was stated by the plaintiff's counsel that since certain decisions, and, particularly, the decision of the House of Lords in *Egerton* v. *Brownlow* (1), the Courts could not refuse to enforce a contract, which could not be described as illegal, merely because it had a tendency to make one of the parties do something which was against the general rules of morality. In some of the cases, no doubt, in which the Courts have refused to enforce contracts upon the strength of the doctrine by which contracts against public policy are not enforceable, that doctrine has been carried to an extent which Alderson B., when advising the House of Lords in *Egerton* v. *Brownlow* (2), described as ridiculous, the particular case he was referring to being *Gilbert* v. *Sykes* (3), where it was held that a wager was void upon the ground that it might tend to induce some one to make an attempt upon the life of Napoleon. But, though the doctrine may have been carried too far, there is no case in which it has been suggested that a contract which has a tendency to induce one of the parties to it to do something contrary to the general rules of morality is not a contract which the Court may refuse to enforce upon that ground. I have no doubt that this was a contract which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognized in this country as owing from a husband to his wife. It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife. When the plaintiff's counsel during the argument, in mitigation, I think, of the husband's conduct, adverted to the fact that at the time when the contract was made the husband and the plaintiff both thought that the wife was going to die soon, I could not help feeling that such a contract as this might make the wish the father to the thought. But, however that may be, it is a contract against public policy as tending to make the husband disregard the acknowledged rules of morality as to married life, and therefore cannot be enforced.

(1) 4 H. L. C. 1. (2) 4 H. L. C. at p. 109.
(3) 16 East, 150.

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I do not propose to go through the American cases which have been referred to by Phillimore J. in his judgment in *Spiers* v. *Hunt*. (1) But, though I think that the authorities in our own law are sufficient to justify the decision which we are pronouncing, I cannot refrain from reading a passage from the judgment of Lawrence C.J., of Illinois, in *Paddock* v. *Robinson* (2) as shewing the view taken by the Courts in the United States with regard to the sacredness of the marriage tie. That learned judge said: "Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a Court of justice." I have been through the cases, and I wish to point out, with reference to the case in the Year-book (Lib. Ass. 40 Edw. 3, pl. 13), that I have not devoted much consideration to it, because the discussion which took place in the cases of *Wild* v. *Harris* (3) and *Millward* v. *Littlewood* (4) and in the case now before us with regard to it shews that that case is no authority for the question before us one way or the other, inasmuch as it is quite uncertain what the facts were and what the decision was. With regard to the cases of *Wild* v. *Harris* (3) and *Millward* v. *Littlewood* (4), the facts in those cases prevent them from being any direct authority in the present case. When I look at those cases carefully, I observe that the decision in *Millward* v. *Littlewood* (4) was a decision which, looking at the arguments and judgments, might be supported upon the ground of estoppel; and one can well conceive that, where a woman was not aware at the time of the contract that the man had a wife living, though the contract itself could not be supported, at the same time the husband, who

(1) Ante, p. 720.
(2) 14 Amer. Rep. 112.
(3) 7 C. B. 999.
(4) 5 Ex. 775.

was setting up that the contract could not be enforced, might be estopped from alleging that he was married at the time when he made the contract. I do not say that that is so, nor can I say that it is not so when so great a judge as Parke B. suggested that it might be so. Then, with regard to the suggestion that an action could be brought upon an implied warranty by the man that he was of ability to marry, that is to say, that he was not a married man, it is possible that that form of action might be sustained and very much the same damages recovered as in an action for breach of the contract. All I will say as to that point is that we have not now to decide it, and difficulties occur to me with regard to such an estoppel. The decisions in *Wild* v. *Harris* (1) and *Millward* v. *Littlewood* (2) do not, in my opinion, conflict with the judgment which I am now delivering, and, even if they did, they were decisions of Courts which do not bind us, and which we should be entitled to disregard. As regards *Wild* v. *Harris* (1), I would call attention to the fact that, as the reporter points out, the question of public policy does not appear to have been raised in that case.

There was a matter alluded to during the argument upon which I desire to make some observations. The plaintiff's counsel has suggested that the tendency of the decisions in modern times has been to hold that the doctrine by which the Courts refuse to enforce a contract, though not a contract to do anything illegal, on the ground that it is against public policy, is one which must not be extended; and he went so far as to tell us that, on consideration of the authorities, we should find, with regard to the question what are contracts against public morality and what are not, that the application of this doctrine has been closed long ago, and that no new instances can arise of contracts which, though not contracts to do anything illegal, cannot be enforced on the ground that they are against public morality. On this point I will refer to two passages from the judgment of Bowen L.J. in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (3) which were cited in argument. The Lord Justice there said: "Rules which rest upon the foundation of public

(1) 7 C. B. 999. (2) 5 Ex. 775.
(3) [1893] 1 Ch. 630, at pp. 661, 665.

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policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient, which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists"; and further on he says: "The determination of what is contrary to the so-called 'policy of the law'"—say the Privy Council in *Evanturel* v. *Evanturel* (1)—"necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." I cannot myself in the least acquiesce in the suggestion that, as habits change and time goes on, we may not find new instances of contracts which cannot be enforced on the ground that they are contrary to public morality. The plaintiff's counsel appeared to suggest that public opinion in this country, with regard to the obligations of the marriage bond as between husband and wife, had undergone, and was still undergoing, change. I prefer, however, to base my decision upon the view that the old rules, which have so long been supposed to govern those obligations, still exist. I am sure that there has not been any such change as has been suggested by reason of a change in the theological view which prevailed in the days when the strict rules with regard to the obligations of marriage, which were acted upon by the Courts of Equity, were originally established. I am satisfied that in real life the strictness of those rules cannot be regarded as in any way abated because in this country most people have ceased to regard marriage as a sacrament in the sense in which it was once so regarded. It is true that, at the time when the old view of the Church as to the nature of marriage prevailed, a Divorce Act was impossible. But, notwithstanding the fact that there is now such an Act, I do not think that has in any way diminished the obligations of married people towards one another. For these reasons I think that the appeal ought to be allowed.

(1) (1874) L. R. 5 P. C. 1, 29.

I wish to say a few words with great respect concerning the judgments of Channell J. and the learned commissioner of assize, as he then was. (1) The judgment of the learned commissioner in this case, as I read it, appears really to have been based upon that of Channell J. The judgment of the latter, as I understand it, was based on the proposition that, if there is a contract which under some circumstances might not be contrary to public policy, to such a contract the rule as to the non-enforceability of contracts which are against public policy can never be applied; and he suggests two cases in which he considers that it would not be against public policy for a married man to promise to marry a woman, one being where his wife is a hopeless lunatic in an asylum and the other where the promise is made at the instance of a wife on her death-bed. In these cases he appears to have thought that such a contract would not have a mischievous tendency, or at any rate so mischievous a tendency, and that therefore the general rule with regard to contracts against public policy would not be applicable; and consequently he declined to decide at that stage of the case that the contract could not be enforced. Speaking for myself, I cannot agree with the view taken by the learned judge as regards either of the instances which he gave.

FARWELL L.J. In the cases of *Wild* v. *Harris* (2) and *Millward* v. *Littlewood* (3), the woman to whom the promise was made must be taken to have been ignorant of the fact that the defendant was a married man when he made the promise; and I propose to say nothing about those cases except that our judgment in the present case does not, in my opinion, in any way impeach the decisions there given. In this case the question is whether an action for damages will lie for the breach of a promise to marry where the woman to whom the promise was made knew that the promisor was a married man when he made the promise. In my opinion no such action will lie, on the ground that such a promise is against public policy. The doctrine by which contracts are held to be void on the ground of public policy is based

(1) 23 Times L. R. 578, 757. (2) 7 C. B. 999.
(3) 5 Ex. 775.

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upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals. I think that the Courts of this country still recognize as fully as ever the sanctity of the marriage tie, whether it be regarded from a merely civil or from a religious point of view. It remains the law that a contract providing for a separation in futuro of husband and wife is void on the ground that it tends to the destruction of the mutual confidence which ought to subsist between man and wife, and is in derogation of the duties which they owe to one another. Effect has been given to these considerations again and again, in the Court of Chancery, in cases dealing with agreements as to the custody of children. Speaking for myself, I find it impossible to realize the position of a man who, in the lifetime of his wife, deliberately affiances himself to another woman, or to understand how in such a case he can reconcile his duty to his wife with the relation of an engaged suitor to another. Whatever may or may not be ground for calling in aid the doctrine of law by which contracts are avoided as being against public policy, it is quite clear that contracts which are contra bonos mores as conducive to immorality or crime come within that doctrine. It appears to me that such a contract as that sued upon in the present case is not only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality. An illustration of the way in which such a contract may afford an inducement to disregard the obligations of morality and the marriage tie is furnished by the case of *Spiers* v. *Hunt* (1), before Phillimore J. In many cases such a promise would be made for the very purpose of inducing the woman to yield to the passions of the man upon some such plausible excuse as that they were already married in the sight of Heaven. It appears to me that, upon the authorities, these considerations alone are quite sufficient to shew that it would be contrary to public policy to allow an action to be maintained upon such a promise. But, furthermore, it is obviously possible that such a contract might

(1) Ante, p. 720.

even lead to crime; and that in some cases, if the virtue of the woman with whom it was made were strong enough to resist the passions of the man, it might induce him to accelerate the dissolution of the bond which prevented the fulfilment of his desires. I agree that the doctrine of public policy is one which must be applied with caution. But I think that it is equally true to say that, where one finds certain principles to have been always insisted upon by the Courts, as far back as the reports of their decisions extend, with regard to the obligations of marriage and the conduct incumbent upon married people, it would be most inexpedient now to depart from those principles which have always been regarded as essential in the interests of public morality and the happiness of married life.

I only wish to add, with regard to the case cited from the Year-book, that it is almost impossible to find out what was actually decided in that case, but it appears to me that the question there may very likely have been whether the condition had been waived or become inoperative through lapse of time, or for some other reason, and the reporter's note would rather seem to shew that the point that the condition was void on the ground that the feoffee had a wife living was not really raised.

KENNEDY L.J. I am of the same opinion. This action is brought, as appears from the statement of claim, for breach of a promise by the defendant to marry the plaintiff upon the death of the defendant's wife; and the defence set up is that such a promise cannot be made the ground of an action for damages, because it is against public policy and void. It was argued for the plaintiff that there is authority in previous decisions for the proposition that an action can be maintained upon such a promise; and, putting aside the old case in the Year-book, the legal effect of which, I agree, it is not easy with any certainty to extract, two cases were relied upon for the plaintiff, one being *Wild* v. *Harris* (1), in the Court of Common Pleas, and the other *Millward* v. *Littlewood* (2), in the Court of Exchequer. I desire to point out that in those cases the cause of action set up in the pleadings differed in a vital respect from that set up in the present case.

(1) 7 C. B. 999. (2) 5 Ex. 775.

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In the case of *Wild* v. *Harris* (1) the promise alleged on the pleadings was not a promise to marry upon the death of the defendant's wife, but a promise to marry within a reasonable time; and in *Millward* v. *Littlewood* (2) the pleading was substantially the same: and in fact there was the essential difference between those cases and the present, which is indicated by the difference in the pleadings, namely, that for the purposes of the decisions there it must be taken that the plaintiff was ignorant at the time of the promise of the fact that the defendant had a wife still living, whereas here it is agreed on the facts that the plaintiff was well aware at the time of the promise that the defendant was a married man whose wife was living. It seems to me, therefore, impossible, having regard to the pleadings in those cases, to treat them as authorities on the question raised by the present case. Apart from those authorities there are none which have been relied upon in favour of the maintenance of such an action. On the other hand, so far as the civil law is concerned, there is the passage from Grotius, quoted by Phillimore J. in the case of *Spiers* v. *Hunt* (3), and also there are the American decisions, which, though not authorities binding in this country, may very properly be referred to as confirming the view which we are taking. The grounds upon which those decisions are based are very eloquently and clearly expressed in the passage cited by Phillimore J. in *Spiers* v. *Hunt* (3) from the judgment of Lawrence C.J. in *Paddock* v. *Robinson* (4), which forcibly indicates how utterly inconsistent is such a contract as that sued upon in the present case with the fundamental elements of public morality. I should have thought it clear beyond the possibility of argument that, quite apart from all considerations of a theological or ecclesiastical character, such a bargain as this is against public policy as tending to immorality, and that nothing but mischief could ensue from upholding it as valid. As it seems to me, apart from the incentive to crime where the promise is to be fulfilled on the death of the present wife, it would be not unlikely, if the fulfilment depends simply upon a

(1) 7 C. B. 999.
(2) 5 Ex. 775.
(3) Ante, at p. 728.
(4) 14 Amer. Rep. 112.

termination of the existing marriage, to constitute a temptation to the parties to endeavour to procure the dissolution of the existing tie by conduct on the part of the husband which would compel the wife to seek for a divorce.

I desire to add a few observations with regard to the use of the term "public policy" in cases of this kind. "Public policy" is a wide and general term, which embraces very different cases. There may be cases in which the law treats contracts as being against public policy, not because anything intrinsically immoral is involved in them, but by reason of some advantage to the public which is supposed to arise from such contracts being forbidden. Another class of cases, to which the present case belongs, is where certain contracts are treated by the law as being against public policy by reason of elementary considerations of morality. While I quite admit, as regards the former class of cases, that changes in social conditions and manners may involve changes in respect of the contracts which are forbidden as being against public policy, but are not intrinsically immoral, I have yet to learn that any similar change can occur in a case in which the prohibition of a contract is based upon elementary considerations of morality. I do not think that in post-Reformation times any change of view material for the present purpose has taken place with regard to the moral obligations involved by marriage. Apart from the especial sanctity which from an ecclesiastical point of view was formerly attached to marriage, and although the idea of its sacramental character, which once formed the basis of the civil law of Europe with regard to it, no longer prevails among the majority of persons in this country, I think that nothing has really ever been allowed to derogate from the sense of the obligations involved in the status of marriage. While, no doubt, there are cases in which separation deeds have been, and will be, upheld, I think I am right in saying that no Court has ever yet held that a deed providing in futuro for the contingency of separation between husband and wife is in accordance with public policy. The cases, I think, in which separation deeds have been held good are really cases in which, circumstances having brought the parties to the point at which separation was

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inevitable, it was merely a question of making provision for the terms of such a separation.

In my opinion the contract sued upon in this case, both upon the authorities in our law and upon general principle, is one which, according to the view which has always heretofore prevailed, and still prevails, as to the obligations of marriage, clearly comes within the class of contracts which are held to be unenforceable on grounds of public policy as being intrinsically immoral in their nature.

Appeal allowed.

Solicitors for plaintiff: *Collyer-Bristow & Co., for T. N. Loy, Alford, Lincs.*

Solicitor for defendant: *R. Brooks.*

E. L.

C. A. 1908 *Feb.* 13.

[IN THE COURT OF APPEAL.]

PETTIT *v.* LODGE & HARPER.

Bill of Sale—Validity—Defeasance—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3.

By a bill of sale the mortgagor agreed to pay the principal sum (together with the interest then due) by equal weekly instalments. Owing to the difficulty of calculating the varying amount of interest due from week to week the parties agreed to substitute for the mode of payment provided by the bill of sale payment by equal weekly instalments of an increased amount, to cover principal and interest, but this arrangement did not alter the aggregate amount payable by the mortgagor for principal and interest:—

Held, that this was a defeasance within s. 10, sub-s. 3, of the Bills of Sale Act, 1878, which ought to have been contained in the body of the bill of sale, or written on the same paper with it before registration, and that the bill of sale was void.

Reed v. *Franks*, (1900) 16 Times L. R. 347, overruled.

MOTION FOR NEW TRIAL.

The action was brought by Mrs. Pettit against a firm of money-lenders for an injunction and damages in respect of the alleged wrongful removal by the defendants from the plaintiff's

house of certain furniture, the property of the plaintiff, included in a bill of sale dated September 25, 1906, and for a declaration that the bill of sale was void and an order cancelling the same.

The plaintiff obtained an advance of 30*l.* on the security of the bill of sale in question, and she thereby assigned to the defendants the chattels and things specifically described in the schedule thereto as security for payment of the said 30*l.*, and interest thereon at the rate of 60*l.* per cent. per annum, and declared that she would duly pay to the defendants the principal sum aforesaid (together with the interest then due) by equal weekly instalments of 5*s.* 9*d.*, the first to be paid on Monday, October 1 then next, and the like sum to be paid on every succeeding Monday in every succeeding week, the last payment of principal money to be the sum of 7*s.* 9*d.*; and in case default should be made in payment of any of the said instalments of the principal sum, it was provided that the same should, until payment, bear interest at the rate aforesaid. And it was further provided that in case the plaintiff should make default in payment of the money thereby secured at the time therein provided, and in certain other events not material to be mentioned, it should be lawful for the defendants to enter upon the premises in which the chattels were and to seize and take possession of the said chattels and things, and, after the expiration of five clear days from the day of seizing or taking possession, to remove and sell the same, provided always that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the defendants for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

This bill of sale was registered on the day following its execution. In order to avoid difficulties as to calculating the amount of interest to be paid weekly, an arrangement was come to, as evidenced by the correspondence, that the weekly payments should be 9*s.* 3*d.*, to cover principal and interest. By this arrangement the aggregate amount which the plaintiff would be required to pay for principal and interest was not altered. The plaintiff paid these instalments until the summer of 1907, when she fell into arrear, and on September 23, 1907, the defendants took possession.

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On the following day, September 24, the plaintiff commenced this action, impeaching the validity of the bill of sale, mainly on the ground that the arrangement as to the weekly instalments was a defeasance or condition within s. 10, sub-s. 3, of the Bills of Sale Act, 1878 (1), and on September 26 she obtained an interim injunction against the defendants.

The action was tried before Lawrance J. and a special jury. The learned judge left it to the jury to assess the amount of damages assuming that the bill of sale was invalid, and the jury gave a verdict in favour of the plaintiff for one farthing. The learned judge then determined the question of the validity of the bill of sale, and held upon the authority of *Reed* v. *Franks* (2) that it was good, and he directed judgment to be entered for the defendants.

The plaintiff appealed, and by her notice of appeal she asked that the order entering judgment for the defendants might be set aside and a new trial ordered.

Ritter (with him *Edmondson*), for the plaintiff. This bill of sale is invalid, because the true bargain is not stated in it, but is contained in the correspondence. The arrangement as to payment of weekly instalments of principal and interest alters the event which entitles the mortgagees to take possession, and it is a defeasance within s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and consequently requires registration. *Reed* v. *Franks* (2) is wrong, and ought to be overruled. Even if the true bargain had been stated in the bill of sale, it would still have been bad, because it would have provided for the payment of a sum which was not rateable interest, and that is contrary to the form in the schedule to the Act of 1882: *Davis* v. *Burton* (3); *Roe* v. *Mutual Loan Fund Association, Ld.* (4)

(1) Sect. 10, sub-s. 3, of the Bills of Sale Act, 1878, provides: "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration of trust shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

(2) 16 Times L. R. 347.

(3) (1883) 11 Q. B. D. 537.

(4) (1887) 56 L. T. 630.

Rawlinson, K.C., and *Compston*, for the defendants. This case is distinguishable from *Davis* v. *Burton* (1) and *Roe* v. *Mutual Loan Fund Association, Ld.* (2), and falls exactly within *Reed* v. *Franks*. (3) Here the mortgagees have stated the true nature of the bargain in the bill of sale, but for the convenience of the parties, and in order to avoid an almost impossible calculation, they have made an arrangement as to the mode in which the 60 per cent. interest is to be payable. That arrangement makes no difference in the amount which has ultimately to be paid by the mortgagor, and does not really alter the nature of the bargain, and if the bill in substance performs the function which the statute intended to be performed by the statutory form, that is sufficient: *Simmons* v. *Woodward* (4), per Lord Halsbury.

[BUCKLEY L.J. Those observations of Lord Halsbury were addressed to a different case; the complaint there was merely that the principal sum of 500*l.* was expressed to be payable (together with interest) by 30*l.* instalments, and that the last instalment being less than 30*l.* was not stated accurately.]

They shew that a mere variation from the strict letter of the agreement will not vitiate the instrument if the substance remains intact.

COZENS-HARDY M.R. This appeal raises a question of the validity of a bill of sale. The action was brought by Mrs. Pettit, the grantor of the bill of sale. She alleges that the defendants, who are money-lenders, have wrongfully broken into her house and taken possession of some furniture. Various objections were raised to the bill of sale, one of which alone it is necessary for us to consider. The bill of sale (which was registered) was in this form. [The Master of the Rolls read the bill of sale, and continued:—] It is perfectly clear that under the bill of sale at the end of the first week there was payable a capital instalment of 5*s.* 9*d.* plus interest on the entire principal sum, amounting in all to 12*s.* 1*d.*, and that, in default of payment of this 12*s.* 1*d.* or any part of it on that date, the bill of sale holder became entitled to enter. The amount of interest payable under the bill of sale

(1) 11 Q. B. D. 537.
(2) 56 L. T. 630.
(3) 16 Times L. R. 347.
(4) [1892] A. C. 100, 108.

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of course would be greatly reduced as the capital instalments were paid off, so that when the last instalment became due there would be very little more payable than the 5*s.* 9*d.* But that was not the real bargain between the parties. The real bargain between the parties was not disputed. It was sworn, and is apparent on the face of the correspondence, that, as it was inconvenient to calculate a varying amount of interest, the parties agreed that if, instead of paying according to the terms of the bill of sale, the plaintiff should pay from first to last 9*s.* 3*d.* per week to cover principal and interest, she would discharge her obligation under the bill of sale. Now that was not the bargain under the bill of sale. The real bargain was shortly this: "You covenanted by the deed to pay me the 30*l.* with interest at the rate of 60 per cent., but if, instead of paying according to the terms of the deed, you pay me from first to last 9*s.* 3*d.* per week you shall be in the same position as if you had performed your covenant, and shall discharge all your obligations under your deed." It seems to me that is exactly and precisely a defeasance, and one which falls within s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and therefore must either be contained in the body of the bill of sale or be written on the same paper or parchment with it before registration. These requirements of the statute have not been complied with, and I am unable to see any answer to the argument that the bill of sale was void in consequence. It is asked what was the money-lender to do? Cannot he arrange for payment by equal instalments? Undoubtedly he can. All he has to do is to put the arrangement in the form of a defeasance. But he has not done so. Then it is said that *Reed* v. *Franks* (1) is inconsistent with this view. With the greatest respect to Darling J., I am bound to say I am unable to follow that case. The learned judge in that case, which is substantially the same as this, said: "It was not an agreement to alter the rate of interest, but merely an arrangement as to the manner in which the interest should be paid." When once you find that it really alters the event in which the money-lender is entitled to enter and take possession of the furniture it is, in my opinion, an irrelevant consideration whether from first to last a greater sum

(1) 16 Times L. R. 347.

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of interest will or will not be payable under one arrangement or the other. The arrangement alters the event in which entry can be made. That being so, I am of opinion that this bill of sale is bad, and that the decision of the learned judge in the Court below, who followed the decision of Darling J., was wrong. Therefore the appeal must be allowed, and judgment must be entered for the plaintiff, subject only to the question of a new trial.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons. The legislation with respect to bills of sale has two objects in view. The one is to restrict within certain limits the nature of the bargain which can be made by a bill of sale. That it does by provisions relating to the form of the bargain. The other is to ensure that the true bargain is registered. That bargain may be contained wholly in the body of the bill of sale, or it may be partly expressed by a defeasance written on the same parchment or paper as the bill of sale before registration. We are not deciding here any question as to what it is possible to put in a bill of sale. We have here the case of a bill of sale strictly in the form prescribed by the Act, but it does not represent the true bargain between the parties. The true bargain was that if the instalments of 9*s.* 3*d.* were paid regularly the right of entry would not be exercised. That part of the bargain was not registered. Consequently the bill of sale was void. I agree with the observations of the Master of the Rolls upon *Reed* v. *Franks*. (1)

BUCKLEY L.J. In my opinion this bill of sale was subject to a defeasance, but the defeasance was not stated in the registered bill of sale. The registration was consequently void. With respect to *Reed* v. *Franks* (1), I think that there also there was a defeasance, and that that decision was wrong.

It having been agreed between the parties that the plaintiff should accept 21*l.* damages, judgment for that amount was entered for the plaintiff with costs; defendants to have the costs of an issue of fraud, on which the plaintiff had failed, with right of set-off.

Appeal allowed.

Solicitors: *Torkington; Walter Turner.*

(1) 16 Times L. R. 347.

H. B. H.

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[IN THE COURT OF APPEAL.]

GREAT CENTRAL RAILWAY COMPANY *v.* SHEFFIELD UNION.

Rating—Rateable Value—Railway—Profits—Mode of ascertaining—Evidence—Admissibility—Profits attributable to the Occupation of Portions of the Railway outside the Parish.

In proceedings for the rating of a section of railway situate in parish A, the railway company tendered evidence that part of the profits of the line in that parish was attributable, not to their occupation of the line in that parish, but to their occupation of the line in parish B, and that in the assessment of their line in parish B it had been held that profits made outside the parish, including profits made in parish A, were attributable to their occupation of the line in parish B, and the rateable value of the line in the latter parish was increased accordingly:—

Held, that the overseers were bound to admit this evidence, and that, in assessing the rateable value of the line in parish A, some deduction ought to be made in respect of any excess sum which the railway company had been held liable to pay for the occupation of their line in parish B by reason of its earning profits in parish A.

This was an appeal from a decision of the Divisional Court (Lord Alverstone C.J. and A. T. Lawrence and Sutton JJ.) upon a case stated by agreement between the parties for the opinion of the Court under s. 11 of the Quarter Sessions Act, 1849, in an appeal to the quarter sessions for the borough of Sheffield against a rate made on the appellants by the overseers of the poor of the parish of Sheffield, in the Sheffield Union.

The case, as amended by agreement on the suggestion of the Court of Appeal, stated as follows:—

1. The appellants are charged with a poor rate made on the 9th day of October, 1907, for the parish of Sheffield, in the Sheffield Union, in the West Riding of the county of York, in respect of certain lines of railway, stations and other hereditaments belonging to and occupied by them within the said parish, and are assessed in respect of such hereditaments at 33,105*l.* gross estimated rental and 20,159*l.* rateable value. The portion of the said assessment attributable to the said lines of railway is 17,877*l.* gross estimated rental and 8740*l.* rateable value.

2. The said figures of 17,877*l.* gross estimated rental and 8740*l.* rateable value were arrived at in the following manner, namely, the gross earnings in the parish were first ascertained, and from such gross earnings the working expenses in the parish, together with the proportion of the miscellaneous expenses attributable to the parish, were deducted. In this way the net receipts earned in the parish were ascertained. From the net receipts a sum was deducted in respect of stations and other portions of the undertaking assessed separately from running lines, and in that way the sum to be divided between the landlord and tenant in respect of the said lines of railway was ascertained. From such last-mentioned sum the occupier's share in respect of interest on his capital, his trade profits, and his risks and casualties was deducted, and the rent which might reasonably be expected from year to year in respect of the said lines of railway was thus ascertained, from which, in accordance with the Parochial Assessments Act, 1836, the cost of maintenance and renewals necessary to keep the said lines of railway in a condition to command the rent was deducted in order to arrive at the rateable value of the said lines of railway. The deduction in respect of stations and other portions of the undertaking assessed separately from running lines was a sum which bears to the gross receipts earned by the appellants in the parish of Sheffield the same proportion as that which the aggregate of the gross estimated rentals of the stations on the appellants' system and the other portions of the undertaking in respect of which the appellants are rated in the parishes where such stations and portions of the undertaking are situated, plus the rates and taxes paid thereon, bears to the gross receipts earned by the appellants upon the whole of their system.

3. The appellants on the 21st day of October, 1907, gave notice to the respondents that they objected to the valuation list for the said parish on the ground that the said hereditaments were assessed therein at too high a sum, for the reason stated in such notice (which is to be deemed part of this case), but upon the hearing of such objection on the 9th day of December, 1907, the appellants failed to obtain relief, and consequently gave notice on the 22nd day of January, 1908, of their intention to appeal

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GREAT CENTRAL RAILWAY v. SHEFFIELD UNION.

against the said rate to the Court of quarter sessions for the borough of Sheffield.

4. The appellants and respondents thereupon consented (subject to the order of a judge being obtained in that behalf) to state a special case for the opinion of the High Court under the provisions of s. 11 of the Quarter Sessions Act, 1849, and have agreed as therein required that judgment may be entered at quarter sessions in conformity with the decision of the Court.

5. It is admitted that the hereditaments assessed as above are part of the system of the appellants' railway undertaking, and that the said lines of railway are those portions of the main lines of the appellants' said system between London and Sheffield, and between Sheffield and Manchester and other places which are situate within the parish of Sheffield. It is further admitted that the revenues accruing to the appellants in respect of the occupation of the said hereditaments are, to a considerable extent, derived from traffic carried over the said lines of railway in the parish of Sheffield (hereinafter called the Sheffield lines) to and from the other parts of the appellants' system. It is further admitted that a considerable part of the revenues accruing to them from the occupation and working of the Sheffield lines of railway is earned by reason of the appellants being in occupation of and working other parts of their system, and that, without being in occupation of such other parts of their system, neither the appellants nor any other person could reasonably be expected to pay for the said lines of railway a rent sufficient to support the rateable value at which the said lines of railway are assessed as aforesaid. In calculating the gross estimated rental of the hereditaments assessed in the parish of Sheffield no deduction has otherwise than as aforesaid been made such as is referred to in par. 7.

6. For the purposes of this case the appellants are to be taken to tender evidence (inter alia) as follows, as to which the respondents are to be taken to contend that they are not bound to act upon it:—

(1.) That the link line situated in part in Banbury Union, which was the subject of the decision in *Great Central Ry. Co.*

v. *Banbury Union* (1), is one of the appellants' lines over which traffic is carried, from which the said revenues accruing to the appellants on the Sheffield lines are in part derived.

(2.) That the rateable value of the Banbury link is in excess of what it would be if regard was had only to the actual net earnings of the appellants on the Banbury link.

(3.) That such excess was, in whole or in part, due to the Banbury link being connected with, and giving access to, other parts of the appellants' system, including the Sheffield lines, and to its providing traffic which is profitable to the appellants on such other parts, including the Sheffield lines.

(4.) That the rateable value of the Banbury link in part arises from the profits of the Sheffield lines.

7. The appellants contend that in estimating the gross estimated rental of the Sheffield lines the overseers were bound to have regard to the fact that the Sheffield lines could not reasonably be expected to let at a rent sufficient to support the rateable value at which they are assessed as aforesaid, except to a person who was to be in occupation of the other parts of the system worked in connection therewith, and also to the fact that any such person, in considering what rent he could pay for the occupation of the Sheffield lines, would necessarily make some deduction from the revenues estimated as likely to accrue to him from such occupation in respect of any excess sum which he has been held liable to pay for the occupation of the Banbury link by reason of its being connected with and giving access to the Sheffield lines and providing traffic which is profitable to him as occupier of such hereditaments, in the same way that he makes a deduction in respect of stations and other portions of the undertaking which are assessed separately from running lines in other parts of the system.

8. The appellants therefore contend that the gross estimated rental of the said lines of railway ascertained as aforesaid is in excess of the rent at which they might reasonably be expected to let within the meaning of s. 1 of the Parochial Assessments Act, 1836, and s. 15 of the Union Assessment Committee Act, 1862, and that the said rate ought to be amended accordingly.

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9. The respondents contend that the assessment of the said lines of railway is correct within the meaning of the said statutes, and that they would have been wrong had they made otherwise than aforesaid any such deduction as that claimed by the appellants.

10. The question for the opinion of the Court is whether the appellants or the respondents are right in their respective contentions.

11. If the Court hold that the respondents are right, the appeal is to be dismissed and the said rate is to be affirmed. On the other hand, if the Court hold that the appellants are right, the appeal is to be allowed and the gross estimated rental and the rateable value of the said lines of railway in the parish of Sheffield are respectively to be reduced, and the said rate is to be amended accordingly. The parties hereto have agreed to raise only the questions of principle at issue between them as aforesaid, and that it shall, in default of agreement, be referred to an arbitrator agreed upon by them (or in default of agreement to be appointed by the Court) to work out in accordance with the decision of the Court the actual figures of reduction, which figures are to be treated as the reductions ordered by the Court, and are by consent to be inserted in the judgment of the said Court of quarter sessions.

The amendments in the case when it was before the Court of Appeal consisted in the insertion of par. 6 and in consequential alterations in par. 7.

The Divisional Court thought that the case as it then existed did not properly set forth the real point at issue between the parties, but, assuming that the case had the meaning which the appellants alleged, they were of opinion that the contention of the appellants was wrong.

The appellants appealed.

C. A. Russell, K.C., *Simon, K.C.*, and *Konstam*, for the appellants. By the decision of the other branch of the Court of Appeal in *Great Central Ry. Co.* v. *Banbury Union* (1) it was held that in assessing the section of the line which was situate

(1) [1907] 1 K. B. 717.

in Banbury parish the rating authority were not confined to the profits earned within the boundary of the parish, but were entitled to take into account the enhanced value of that strip of line arising from the fact that it gave access to other parts of the appellants' system, including Sheffield. It follows from that decision that in assessing the Sheffield lines the fact that some part of the profit of those lines is due to the appellants' occupation of the Banbury line must be taken into account, and that some deduction ought to be made on that footing. This is expressly recognized by Farwell L.J. in the *Banbury Case* (1); and the observations of Buckley L.J. point in the same direction, and are founded on the dicta of Lord Campbell in *South Eastern Ry. Co.* v. *Dorking*. (2)

[They were stopped.]

Hugo Young, *K.C.*, and *R. Cunningham Glen*, for the respondents. The dictum of Farwell L.J. in the *Banbury Case* (1) was merely obiter. All that was there decided was that in dealing with a parochial question the Court of quarter sessions were not wrong in taking into consideration the fact of contributive value. The question here is not whether, if the rating authority had admitted the proposed evidence, the Court would say that it was admissible, but whether the rating authority were bound to adopt the principle contended for by the appellants—a principle which involves that the rating authority of every parish must take into consideration the takings of the whole line. Prima facie, as appears from the *Banbury Case* (1) itself, the determination of the rateable value of a hereditament is a question of fact, and if the rating authority have applied any one of several recognized methods to the solution of that question, the Court will not insist upon their adopting some other method. Here the rating authority have adopted the ordinary parochial principle, which is universally recognized, and the Court will not force them to make an investigation which would be altogether impracticable. This is not the converse of the *Banbury Case* (1), because what was done there was within the ken of the local authority. No doubt it sounds very plausible to say that what is put on at one place must be taken

(1) [1907] 1 K. B. 717. (2) (1854) 3 E. & B. 491, 514.

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off at the other; but the result would be to inflict a grave injustice upon the rating authorities, because no particular authority would have any means of checking what had been done elsewhere, seeing that all the information is in the hands of the railway company, and none of it in the hands of the rating authority. However desirable the principle may be in theory, if the Court sees that it is incapable of equitable adjustment, it will not order it to be adopted.

[BUCKLEY L.J. In *Reg.* v. *West Middlesex Waterworks* (1) Wightman J., delivering the judgment of the Court, deals with the point raised in this case, and says that the Court is bound to protect the occupier of an undertaking extending over several parishes from being rated beyond the rateable value of the whole taken together.]

That dictum was not germane to the decision of the case, and, if the occupier requires to be protected, the parishes equally require protection against too great a reduction being allowed: *Reg.* v. *Great Western Ry. Co.* (2)

COZENS-HARDY M.R. This case has been very learnedly argued, but I am bound to say that I do not feel much difficulty in dealing with it. We have not now to deal with the case stated as it was when it was before the Divisional Court. That Court felt pressed with the same difficulty that we did, that the statements were too vague and general, and that they had not, as we had not in the first instance, any concrete facts upon which they could properly be asked to give their judgment; but we have now a definite statement of the effect of the decision of the Court of Appeal in *Great Central Ry. Co.* v. *Banbury Union.* (3) Now that is a decision of the other branch of this Court; it is absolutely binding upon us, and I will say no more about it than this, that it must not be imagined that I desire to put forward any different view from that which was there taken. It is quite true that all that was decided by that case was that in assessing a certain section of line—some six or seven miles—having regard to the fact that this was a portion of the main

(1) (1859) 1 E. & E. 716, 722. (2) (1852) 15 Q. B. 1085.
(3) [1907] 1 K. B. 717.

line of the Great Central Railway Company, the contributory value, as it is called, ought to be taken into consideration in addition to the small profits of that section taken by itself. That was the decision, but it seems to me to follow as a corollary from that decision that, if you are to take into consideration the contributory value and add it to what I may call the normal assessment in the Banbury Union, when you come to the other parts of the line, you must have regard to the fact that that which is an addition in Banbury ought in some way to be made a deduction elsewhere. Farwell L.J., in what I agree was a mere dictum, put the matter very shortly. He said (1): "It appears to me that it follows that if you take into consideration in rating in parish A, the enhanced value in parishes B, C and D, in some way or other credit ought to be given for such value in parishes B, C and D." Buckley L.J. will himself say what he meant, but I think his observations were precisely in the same direction. But, although it did not arise for decision, and although it is a mere corollary from that decision, we are not left without a guide in this matter. In the important case of *South Eastern Ry. Co.* v. *Overseers of Dorking* (2), decided in 1854, Lord Campbell, Crompton J. and Coleridge J.—three out of the four members of the Court—dealt with the question of the contributory value almost precisely on the lines on which the decision in the *Banbury Case* (3) was arrived at; but there is one passage in Lord Campbell's judgment which puts the matter very clearly. It is this (4): "This profit, although not received for the traffic upon the line in the parish of Dorking, originates from the occupation by the appellants of land in the parish of Dorking; and, if they are assessed in that parish in respect of this profit, in estimating their profits in the parishes through which the main line passes there ought to be a deduction in respect of what is paid for the line which is worked as a feeder to the main line. This calculation, though difficult, may be made upon data which are accessible, and is not more difficult than calculations, which must be made in railway rating where stations and inclined planes in one parish affect the traffic in

(1) [1907] 1 K. B. 717, at p. 732.
(2) 3 E. & B. 491.
(3) [1907] 1 K. B. 717.
(4) 3 E. & B. 514.

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another parish." That is a decision more than half a century old. The case of *Reg.* v. *West Middlesex Waterworks* (1), decided in 1859, in which Wightman J. gave the considered judgment of the Court, is strongly affirmative of the same principle. It is a principle which also commends itself to me very strongly as a matter of common sense, and I think, therefore, that we must discharge the order of the Court below and must make a declaration in accordance with the appellants' contention.

FLETCHER MOULTON L.J. I am of the same opinion, and agree completely with the judgment which the Master of the Rolls has just given. It appears to me that the doctrine laid down in a long line of cases, beginning with the *Dorking Case* (2) in 1854, and concluding with the *Banbury Case* (3) in the other branch of this Court last year, is that you must consider where the profits of an undertaking which exists in more than one parish are really made, and that you must not necessarily assume that they are made in the parish where at first sight they appear to be. In the *Dorking Case* (2) Coleridge J. puts this doctrine very clearly. He says: "In each"—parish, that is—"the overseers will rate him" (the occupier) "in respect of the property in their parish; and they will estimate its value by what it produces, not merely there, but anywhere; if the profits of some other land in his occupation in another parish are mixed up with what the land in their parish produces, that ought to be the ground of a deduction from the assessment; and, if not made, the rate may be excessive in amount."

Now in the *Banbury Case* (3) it was decided that the strip of line in the Banbury parish really earned profits in the remainder of the line, or, to take a concrete example, earned profits in Sheffield. Therefore the rateable value of the proportion of the land in the Banbury parish was increased by a consideration of the profits which it earned out of that parish, i.e., in Sheffield. Now we come to the Sheffield parish. Part of what appears at first sight to be profits earned in the Sheffield parish may be, and in the *Banbury Case* (3) was held to be, earned really in the Banbury parish.

(1) 1 E. & E. 716. (2) 3 E. & B. 491, at p. 512.
(3) [1907] 1 K. B. 717.

Then they are no longer profits earned in the Sheffield parish, and the rating must not be on a hypothetical rent based on those profits as being profits earned in the Sheffield parish. As Coleridge J. said in the passage which I have just quoted, as the profits earned in the Banbury parish are mixed up with those earned in the Sheffield parish, that ought to be the ground of a deduction from the assessment in the Sheffield parish. This appears to me to be a plain corollary, to use the language of the Master of the Rolls, from the decision of the other branch of the Court in the *Banbury Case* (1), and I entirely agree with the conclusion to which he has come.

BUCKLEY L.J. Profits are not rateable as such, but in dealing with a railway undertaking the profits earned in the parish, if the parochial principle be adopted, are a factor—I might almost say the factor—which determines the rent which the hypothetical tenant will pay. In the *Banbury Case* (1), what the Court, proceeding on the whole of the authorities, affirmed was this, that in rating the railway line in the parish the overseers are entitled to regard, not only the profits earned in the parish, but profits earned outside the parish attributable to the ownership of the land in the parish. To express it shortly, they may regard, not only home profits, but foreign profits attributable to the land in the parish. We had in that case nothing to do with the question we have here to decide, namely, how the railway is to be rated in the second parish when the land in the first parish has been assessed upon the principle that profits earned in the second parish are to be regarded in rating in the first parish. I myself said nothing about it, because it did not arise for decision, except that I referred for another purpose to the passage in Lord Campbell's judgment (which is material to the present case), in which he stated that there ought, under those circumstances, to be a deduction. Farwell L.J. went further; he said something affirmatively upon the point. But I think the respondents are entitled to say that the decision in the *Banbury Case* (1), so far as the point before us is concerned, does not bind us at all. It was not a decision; it was a dictum

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of Farwell L.J., and nothing more, and the point is open. Now the point for decision is this. Where, in what I will call parish A, it has been proved as matter of fact that not only the home profits in A, but foreign profits, say, in B, are attributable to the occupation of land in A, are the railway company entitled when they come to be assessed in parish B to say, "Now we propose in the matter of this assessment in B to prove that that which was proved as matter of fact in A is the fact"? Of course, parish B is not bound by anything done in the assessment in parish A, but, having regard to par. 6 of this case, the question is whether it is permissible for the railway company to prove, when their line is assessed in parish B, that, as matter of fact, part of their profits in B is attributable, not to their land in B, but to their land in A, as had been held when they were assessed in parish A. In my opinion they are plainly entitled to do that. It must be competent to the company, if the parochial principle is adopted, to say, "It was decided against us in parish A that profits made outside A, namely, in B, are attributable to land in A. Now we want to affirm the same principle for the purpose of saying that now in parish B part of our profits in B is attributable, not to land in B, but to land in A, and therefore the rent which the hypothetical tenant will pay must be reduced accordingly."

I think that this appeal must be allowed.

Appeal allowed.

Solicitors: *Dixon H. Davies; Pilgrim & Phillips, for Watson, Esam & Barber, Sheffield.*

H. B. H.

[IN THE COURT OF APPEAL.]

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GOODSON *v.* GRIERSON.

Practice — Frivolous and vexatious Action — Dismissal — Cause of Action — Gambling Debt—Forbearance to sue—New Consideration.

To an action commenced by a bookmaker by specially indorsed writ for a sum alleged to be due on a stated account, the defendant pleaded in his defence that the debts were gambling debts, and this was admitted by the plaintiff by his answer to interrogatories, but the plaintiff stated by his answer, as other considerations for the defendant's indebtedness, the plaintiff's forbearance to sue and his giving time to the defendant at the latter's request. The defendant applied to have the action dismissed as being frivolous and vexatious :—

Held, that the forbearance to sue at the defendant's request, in view of the possible apprehension of the defendant of the consequences of not paying the gambling debt, which it would be competent to the plaintiff, consistently with the pleadings, to allege and prove, might constitute a new and valid consideration for the debt, and that the action ought not to be summarily dismissed.

Appeal from a decision of Jelf J. in chambers.

The plaintiff, a well-known bookmaker, commenced an action against the defendant by specially indorsed writ for 569*l.* 5*s.* 8*d.* for moneys found due from the defendant to the plaintiff on the taking of accounts between them on August 24, 1907.

The defendant then applied to strike out the statement of claim on the ground that it disclosed no reasonable cause of action, and that the action might be dismissed as being frivolous and vexatious and an abuse of the process of the Court, and in support of this application he filed an affidavit in which he stated that the only transactions he had ever had with the plaintiff were bets upon horse-races, and that the account, and every item thereof, was solely in respect of bets upon horse-races made by the plaintiff with himself; and he concluded: "I am advised and believe that for the reasons above stated I am not in law indebted to the plaintiff in the amount claimed in this action or any part thereof, and that the plaintiff's action is frivolous and vexatious and an abuse of the process of the Court, the plaintiff being well aware that by reason of the provisions of the Gaming Acts he has no cause of action and cannot succeed."

When the application came before the Master, the Master,

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being of opinion that the statement of claim shewed a perfectly good cause of action on the face of it, adjourned the application in order to give the defendant an opportunity to apply for leave to interrogate the plaintiff. Subsequently leave was obtained, subject to a defence being first delivered. A defence was accordingly put in pleading the Gaming Acts, and interrogatories were delivered. The first interrogatory asked whether it was not the fact that each of the items in the account for the week ending August 24, 1907, was composed wholly of the amounts of bets upon horse-races or of winnings upon bets upon horse-races made by the plaintiff with the defendant. The second was as follows: "If you allege that the said items in the said account do not, or that any of them does not, consist wholly of such bets or winnings, state which and what portions thereof respectively do not consist of such bets or winnings. In respect of what transactions and upon what considerations (other than the alleged account stated) did the defendant become indebted to you in the sums included in the said account which are alleged by you to have been incurred otherwise than for bets or winnings on bets?" The plaintiff, by his answer to the said interrogatories, admitted, for the purposes of the trial of the action only, that the items of the account sued for were composed wholly of amounts for bets upon horse-races or of winnings upon bets upon horse-races made by plaintiff with defendant; and he continued: "The other considerations upon which defendant became indebted to plaintiff were the plaintiff's forbearance to sue the defendant at defendant's request and his giving the defendant a few weeks' time to pay the said amounts pursuant to defendant's request in writing, undated, but received on August 29, 1907."

The application then came on again before the Master, who dismissed the action as frivolous and vexatious, and the judge in chambers upheld this decision.

The plaintiff appealed.

Lush, K.C., and *Rose-Innes*, for the plaintiff. Although no action can be founded on a gambling debt—*Kershaw* v. *Sievier* (1)—

(1) (1904) 21 Times L. R. 40.

yet, if there has been a new consideration, such as giving time to the defendant to pay or accepting a smaller sum by way of settlement, there may be a good cause of action: *Goodson* v. *Baker* (1); *In re Browne* (2); *Bubb* v. *Yelverton* (3); and, unless there cannot possibly be a good cause of action, the action will not be dismissed as frivolous and vexatious.

Low, K.C., and *Attenborough*, for the defendant. Forbearance to sue does not constitute a new consideration in a case where, to the knowledge of the plaintiff, there is no cause of action: *Wade* v. *Simeon* (4); *Chapman* v. *Franklin*. (5) The latter is an a fortiori case, for there not only was time given to the defendant, but there was an agreement to accept a less amount, yet the Court held that the action would not lie.

[FLETCHER MOULTON L.J. It would be open to the plaintiff at the trial to shew that if the defendant had been pressed his social position would have been injured.]

There is no suggestion of any such case on the pleadings. The defendant has only to negative the possibility of the plaintiff's succeeding on the documents as they stand. Taking the statement of claim with the answers to interrogatories, there is here no cause of action. *Goodson* v. *Baker* (1) is distinguishable, because there there was evidence that the defendant was actuated by the fear of exposure. [They also referred to *Metropolitan Bank* v. *Pooley*. (6)]

FLETCHER MOULTON L.J. In my opinion this appeal must be allowed. The respondent claims that the action has been rightly dismissed by the judge as being frivolous and vexatious, and he bases that partly on r. 4 of Order xxv. and partly on the inherent jurisdiction of the Court. In my opinion r. 4 has nothing to do with the matter. That rule provides that "the Court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer." There is here no order to strike out the statement of claim, which is, in form, a perfectly good statement of claim. Therefore that part of the

(1) *The Times* of Feb. 14, 1908.
(2) [1904] 2 K. B. 133.
(3) (1870) L. R. 9 Eq. 471.
(4) (1846) 2 C. B. 548.
(5) (1905) 21 Times L. R. 515.
(6) (1885) 10 App. Cas. 210, 214.

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rule does not apply. Then it goes on thus: "Or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed or judgment to be entered accordingly, as may be just." In my opinion that is limited to the case where on the face of the pleadings it is shewn that the action cannot be maintained and is frivolous and vexatious. Here the attempt to shew that the action is frivolous and vexatious is not based on the pleadings. It is admitted that on the pleadings no such case could be made out. A defence has been put in, a general traverse is implied in the absence of a reply, and thus the pleadings are regular and adequate. But the defendant has obtained some important admissions from the plaintiff in his answer to interrogatories, and on that ground he seeks to have the action dismissed as frivolous and vexatious. It is, of course, quite open for him to do so. He might even do so on affidavits sworn by himself or made on his behalf, and a fortiori he can do so on admissions obtained from the other side. But it is a serious thing to dismiss an action before it has been tried, and a clear case for doing so must be made out. It is admitted that the debts sued on were originally betting debts, and of course no action could be brought in respect of them. But the plaintiff says that there was a good consideration for the sums appearing in the account stated in that the plaintiff at the request of the defendant forebore to sue and gave the defendant time to pay. In order to support an application of this kind the defendant has to shew that under no possibility could there be a good cause of action consistently with the pleadings and the facts in the case. But in this case counsel for the defendant is obliged to admit that there are cases where it has been held that, having regard to the serious social consequences which would ensue from an unsatisfied demand for a debt of this kind, there may be good consideration in such forbearance. I am not going to express any opinion on that point, nor am I going to express any opinion as to what the result of this action will be. All that I say is that, seeing that this action has not reached the stage at which the Court can assume that it knows the whole of the facts, it is impossible to say that the plaintiff must necessarily fail to shew

that his forbearance would, under the decided cases, constitute a good consideration to support the account stated. Having come to that conclusion, it is obvious that this action ought not to be stopped at this stage. It ought to go on until all the facts can be laid before the Court, and when the Court has cognizance of those facts it can then decide whether there is a proper cause of action. In other words, it must go on to trial. Therefore this appeal must be allowed, with costs here and below.

BUCKLEY L.J. The order under appeal is an order dismissing this action as being frivolous and vexatious and an abuse of the process of the Court. Although the order is thus worded, the real question is whether there is any cause of action. Although a defence has been put in and interrogatories administered, it is admitted by counsel for the plaintiff that if there is no cause of action the action ought to be stopped. The defendant must make out, not that there may be, but that there is, no cause of action. The action is brought by a specially indorsed writ. A defence has been put in. The defendant has extracted from the plaintiff, by means of interrogatories, some information which may be of value to him. Putting the case most highly in favour of the defendant, let me take it that this matter is made part of his defence. Then it comes to this. The plaintiff sues the defendant for so many pounds on an account stated. The defendant says that all the items are gaming debts, and that the other considerations upon which he became indebted to the plaintiff are the plaintiff's forbearance to sue at his request and the plaintiff's giving him a few weeks' time to pay gaming debts which he was not bound to pay. To that defence the plaintiff would be entitled by general traverse or otherwise to reply that those were not the only considerations. [The Lord Justice read the interrogatories.] It would be competent to the plaintiff to reply: "I forbore to sue you at your request, because you expected serious social or commercial consequences to ensue from my insisting on my demand—such, for example, as expulsion from your club, or injury to your business; and on my promise not to sue you you agreed to pay me the same amount as the amount of the gambling debts." Under those circumstances, to use Lord Romilly's words

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in *Bubb* v. *Yelverton* (1), the agreement would be given, "not to pay racing debts, but to avoid the consequences of not having paid them." I am not saying in the least that the plaintiff will succeed. I have no idea whether he will or not. But the question is, Is it impossible that he should succeed? It appears to me that the plaintiff might prove facts which might lead to his succeeding in the action, and until the Court knows all the facts it is impossible to say that this action can be stopped.

Appeal allowed.

Solicitors: *R. S. S. Walker; Andrew, Wood, Purves & Sutton, for Halliley & Morrison, Bedford.*

H. B. H.

C. A. 1908 *Feb.* 10, 11, 17.

[IN THE COURT OF APPEAL.]

PENN *v.* SPIERS & POND, LIMITED.

Employer and Workman—Compensation—Rate of Remuneration—"Earnings"—"Tips" or Gratuities—Earnings in the Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. 1., s.* 1 (*a*) (*i.*); *s.* 2.

"Earnings in the employment of the same employer" in respect of which compensation is recoverable under the Workmen's Compensation Act, 1906, need not always come from the employer; and where the employment is of such a nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, the money thus received with his knowledge and approval must be brought into account in estimating the "average weekly earnings" in respect of which compensation has to be awarded.

APPEAL against an award of compensation under the Workmen's Compensation Act, 1906, by the judge of the Wandsworth County Court.

The deceased workman, a young man of about twenty years of age, was employed by the defendants as a waiter on a restaurant-car running on the London and South Western Railway; the pay given him by the defendants was 12*s.* 6*d.* a week and three meals a day, which had been admitted for the purposes of this case as worth about another 12*s.* 6*d.* a week; the deceased also

(1) L. R. 9 Eq. 471.

received gratuities and "tips" from passengers using the restaurant-car, which he was allowed to keep, and which averaged in his case from 10*s.* to 12*s.* weekly. While in the employment of the defendants the deceased met with an accident, which proved fatal. There was no question as to the liability of the defendants to pay compensation to a dependant of the deceased, an illegitimate child; the only question raised was the proper basis upon which it was to be calculated. The county court judge declined to take the "tips" into consideration, and assessed the compensation on the basis that the weekly earnings of the deceased were 25*s.* for pay and food.

The defendants had paid into Court 156 times this weekly sum, i.e. 195*l.*, and the county court judge held that to be sufficient.

The dependant appealed.

C. A. Russell, K.C., *Drysdale Woodcock*, and *G. C. O'Gorman*, for the appellant. The 10*s.* or 12*s.* received by the deceased weekly from "tips" are clearly "earnings in the employment" within Sched. I. (*a*) (i.) of the Workmen's Compensation Act, 1906; it is not necessary that they should come from the employer, so long as they are earnings "in the employment." On this point the county court judge was wrong. It is not suggested that "tips" were prohibited; in fact it is notorious that in this "employment" "tips" formed a very considerable portion of the earnings, and they were received and retained with the knowledge and sanction of the employers.

It was not necessary that there should have been any express bargain before the deceased was engaged that "tips" should be retained as part of the earnings. Where a servant is thus allowed to receive "tips" as part of his pay, the average value of these "tips" must be taken into consideration in calculating the compensation, just in the same way as the allowance for food was taken into account. The cash payment, &c., allowance for food, and the "tips" are all to be considered as "average weekly earnings" by which the workman was remunerated.

[BUCKLEY L.J. referred to *Cooper* v. *Blakiston*. (1)]

Even assuming that the "tips" given to the waiter do properly

(1) [1907] 2 K. B. 688.

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belong to the employer, still, if the employer does not claim them and allows his servant to retain them, they amount to weekly earnings upon which compensation must be based.

A. Powell, K.C., and *F. Mellor*, for the defendants. There is no vested right to a "tip" or gratuity, which is a gift voluntarily given. It is only what the servant receives in his employment, i.e., from his employer, that has to be taken into consideration. Sched. I., s. 2 (*a*), refers to "employed" "by the same employer." It is entirely a question of what the man earns by his "employment." No provision is made by the schedule for compensation in respect of what a man earns on his own account as principal. Suppose, for instance, a man earned something when off duty as a musician on his own account, this could not be taken into account.

This man was employed as a waiter to attend on the defendants' customers; he was only twenty years of age, and he received 25*s.* a week in this employment. "Earnings" are what a man by reason of his employment has a right to demand from his employer, and gratuities are not "earnings" in this sense.

No evidence was given that the defendants knew that "tips" were received, or that the defendants consented to their being retained; and there was no evidence to shew that this custom of giving and retaining "tips" was in the contemplation of both parties when the contract of service was entered into, or that any lower wages were accepted in consequence of this custom.

C. A. Russell, K.C., in reply. The county court judge has found that there must be an express contract that "tips" were to be retained, and that "earnings" means earnings between employer and employed, and nobody else; and on both these grounds he has misdirected himself, and the case should be remitted to take into consideration the whole of the man's earnings in this employment.

Cur. adv. vult.

Feb. 17. The judgment of the Court (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) was delivered by

COZENS-HARDY M.R. This is an appeal against an award of his Honour the late Judge Russell, and it raises an important question

as to the circumstances, if any, in which "tips" or gratuities ought to be brought into account in considering the "earnings" of a deceased workman. The material facts may be shortly stated. [Having stated the facts, his Lordship continued:—]

It was proved that the deceased habitually received from customers whom he served certain "tips," amounting on the average to from 10*s.* to 12*s.* a week. A claim that regard should be had to these "tips" was rejected by the learned county court judge on two grounds—first, because "weekly earnings means earnings between employer and employee, and nobody else"; and, secondly, even if the first point is not good, because the evidence did not shew any express and distinct bargain — as opposed to an implied bargain—that the employee should retain the "tips" in addition to his wages. In our opinion neither of these propositions can be supported.

It has often been pointed out in this Court that the measure of compensation under the Act is not wages, but earnings. This is conceded by the respondents, who admit that the value of the board must be taken into account. It is not every kind of earnings which can be taken into account. They must be earnings in the employment. If the workman by the exercise of his talents during his leisure hours, as, say, a conjurer or a musician, gains money, the money thus gained will increase his income, but not his "earnings," within the Act. "Earnings in the employment" do not always come from the employer. It is common knowledge that there are many classes of employees whose remuneration is derived largely from strangers. A hall porter at an hotel and a driver of a postchaise are sufficient illustrations. It would be absurd to say that the money received from the hotel-keeper or the post-master alone represents the rate per week at which the workman was being remunerated. The 3*d.* per mile to the post-boy or driver is clearly part of his remuneration. We can see no ground for insisting upon an express or direct contract in this sense, that it must be proved that the workman said before he was engaged that he would only accept the wages offered on the express condition that he should be allowed to retain the "tips." It is, at any rate, sufficient if the Court finds that it was an implied term of the contract,

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and that both parties contracted on that footing. To avoid misconception, we desire to state that nothing in this judgment extends to "tips" or gratuities (*a*) which are illicit; (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (*c*) which are casual and sporadic and trivial in amount. But where the employment is of such nature that the habitual giving and receiving of "tips" is open and notorious and sanctioned by the employer, so that he could not complain of the retention by the servant of the money thus received, we think the money thus received with his knowledge and approval ought to be brought into account in estimating the average weekly earnings. Assuming the principle thus indicated to be sound, it is impossible to doubt that the employment of the deceased as a waiter in a restaurant-car was of the class lastly described. It is notorious that "tips" are given to waiters, and the employers could not pretend to be ignorant of the custom. They must have known that the deceased would receive, and, so far as they were concerned, they must be taken to have agreed that he should receive, "tips" from customers in addition to his cash wages. In short, it was an implied term of the contract of employment that these "tips" should be part of his earnings in his employment, and by virtue of his employment. The case must go back to the county court judge to compute or estimate, as best he can, what amount ought to be allowed in respect of these "tips." The respondents must pay the appellant's costs of this appeal, and also the costs in the county court since the payment into Court of the 195*l.*, and the costs deducted out of the 195*l.* must be refunded.

Appeal allowed.

Solicitor for appellant: *Charles May.*
Solicitors for respondents: *W. Hurd & Son.*

W. C. D.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

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Oct. 15.
1908
Feb. 12.

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Railway—Regulation—Increase of Rates—Reasonableness—Evidence—Railway and Canal Traffic Act, 1894 (57 & 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, it is enacted that where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

The question whether an increase in a rate is reasonable depends upon the circumstances existing at the time the increase was made, including the charges before and after the increase with reference to the services rendered and to be rendered, the expenses of performance, and every other fact with relation thereto.

The Act of 1894 does not confer any general jurisdiction upon the Court of the Railway and Canal Commission to investigate the reasonableness of rates.

APPLICATION by the North Staffordshire Colliery Owners' Association complaining that the defendant railway companies had jointly with one another increased as from August 1, 1900, certain rates on coal and coke from collieries in North Staffordshire to Ellesmere Port and Birkenhead.

The circumstances under which the increase complained of was made, and the facts relied on by the defendants as a justification for the increase, are fully stated in the judgments, and were shortly as follows: In 1895, owing to the depression then prevailing in the coal trade, a reduction was made by the railway companies at the request of the colliery owners in the rates (which had stood at the same figure since before December 31, 1892) from the collieries in question to certain ports on the Mersey, including Ellesmere Port and Birkenhead. In 1900 the coal trade was in a flourishing condition and the cost of railway working had largely increased, and the rates were on

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August 1, 1900, put back substantially to what they had been in 1895. In 1904 some of the rates, but not those to Ellesmere Port and Birkenhead, were again reduced.

The defendants, by their answers to the application, raised as a question of law the contention that, as the rates after the increase of August 1, 1900, were no higher than they had been on December 31, 1892, the defendants had not "since the last day of December, 1892, directly or indirectly increased" the rates within s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894. On this point the decision of the Court of Appeal was against the defendants. (1)

Sir R. B. Finlay, K.C. (*Joseph Shaw* with him), for the North Staffordshire Railway Company; *Cripps, K.C.*, and *Moon, K.C.* (*J. A. Simon* with them), for the London and North Western Railway Company and the Shropshire Union Railways and Canal Company. The Court of Appeal having decided that the defendant companies did on August 1, 1900, increase the rates, the onus lies on them under s. 1, sub-s. 1, of the Act of 1894 to prove that the increase is reasonable. In determining whether an increase is reasonable the Court can only take into consideration the circumstances which existed at the time the increase was made; matters which only came into operation after the increase are immaterial and must not be looked at: *Rickett, Smith & Co.* v. *Midland Ry. Co.* (2) In the present case the evidence shews that there was ample justification for the increase in 1900, and, therefore, this application fails. The real substance of the applicants' complaint is that the reduction in 1904 was not extended to the two ports in question; but that is a matter which the Court has no power to inquire into, for, even assuming for the purpose of argument that these rates are now unreasonable, there is (apart from undue preference, which is not suggested here) no power under the Act of 1894, or any other Act, to compel a railway company to reduce an unreasonable rate, if it be the fact, as is the case here, that the increase in the rate was reasonable at the time it was made. Further, the fact that the

(1) [1907] 2 K. B. 191.

(2) [1896] 1 Q. B. 260; 9 Ry. & Ca. Tr. Cas. 107.

rates are now no higher than they were on December 31, 1892, is prima facie evidence that they are reasonable: see the judgment of Fletcher Moulton L.J. in the present case in the Court of Appeal (1); *Mansion House Association* v. *Great Western Ry. Co.* (2), per Rigby L.J. Before the Act of 1894 a rate was reasonable provided that it did not exceed the maximum fixed by the railway company's Act: *Great Western Ry. Co.* v. *McCarthy* (3), per Lord Watson. The Act of 1894 made this alteration, that thenceforth the prima facie standard of reasonableness is to be the figure at which rates stood on December 31, 1892.

Harold Russell, for the Great Western Railway Company.

Balfour Browne, *K.C.*, and *Rowland Whitehead*, for the applicants. In a case where an increase in rates is sought to be justified on the ground of a rise in working expenses, such as the price of coal, which has only a temporary effect, the question whether the increase is reasonable or not is not to be decided solely by considering the conditions existing at the time of the increase: *Black* v. *Caledonian Ry. Co.* (4), per Sir Frederick Peel. Otherwise an increase due to an apprehended rise in working expenses which subsequent events proved to be unfounded could never be challenged. The language of sub-s. 1 of s. 1 of the Act of 1894 is opposed to the defendants' view, because it says that the onus shall lie on the railway company to prove that the increase "is," not was, reasonable, which shews that the state of things existing at the time of the complaint must also be taken into consideration. If the defendants intended seriously to contend that the increase in 1900 was justified by the rise in the price of coal, they were bound under an order which was made in this case to give particulars of the figures on which they rely, and the fact that they have not given any particulars shews that they cannot justify the increase on that ground. They are really seeking to justify the increase on the ground that the rates are still no higher than they were on December 31, 1892, which is an attempt to go behind the decision of the Court of Appeal. There

(1) [1907] 2 K. B. 191, at p. 210.
(2) [1895] 2 Q. B. 141, at p. 146.
(3) (1887) 12 App. Cas. 218, at p. 235.
(4) (1901) 11 Ry. & Ca. Tr. Cas. 176, at p. 194.

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is no prima facie presumption that the rates in force at that date were reasonable: *Smith & Forrest* v. *London and North Western Ry. Co.* (1), per Wright J.

Cripps, K.C., in reply. *Black* v. *Caledonian Ry. Co.* (2) shews that the justification for an increase must be looked for at the time the increase was made. Sir Frederick Peel's observations were merely directed to shewing that the evidence in that case did not justify the raising of the rates.

Cur. adv. vult.

1908. Feb. 12. A. T. LAWRENCE J. read the following judgment:—This is an application under the Railway and Canal Traffic Act, 1894. The subject-matter of complaint is an increase of the rates of freight from certain collieries in North Staffordshire to the two ports Birkenhead and Ellesmere Port. The increase was made in the year 1900. The facts are these. For some time previously to and in the year 1892 a group rate was in force from those collieries to the ports on the Mersey. No change in this rate took place until after the passing of the Act of 1894. In 1895 the rate was reduced about 2*d.* per ton at the request of the colliery owners. In the year 1900 this reduction was discontinued, and the rate was raised to substantially the same level as had existed in 1892. In 1904 the rate was again reduced to about the 1895 level in the case of all the ports except Birkenhead and Ellesmere Port. In the case of these two ports this 1904 reduction was refused by the railway companies, partly on the ground of some arrangement with the Great Western Railway Company and partly on the ground that the rate as it stood was reasonable and proper when compared with the rates to the other ports, and having regard to the fact that services were rendered additional to those performed for the same sums in 1892. When the case first came before this Court it was contended that the increase made in 1900 was not an increase within the meaning of the Railway and Canal Traffic Act, 1894. It was said, as a matter of law, that upon the true construction of the Act of 1894 the rates in force in 1892 were thereby made a standard, and that

(1) (1900) 11 Ry. & Ca. Tr. Cas. 156, at p. 160.

(2) 11 Ry. & Ca. Tr. Cas. 176.

no rate which was less than that standard could be an "increase" within the meaning of the Act. This contention prevailed in this Court; but, upon appeal to the Court of Appeal, it was overruled by a majority of the Court of Appeal. (1) The result is that the onus by that Act is thrown upon the railway companies of proving that the increase made in 1900 is reasonable.

This is a question of fact, and, like all other questions of fact, has to be determined upon the evidence. I propose to deal with the question purely as a matter of fact, and upon the evidence adduced before us. The reasonableness of a rate or charge must depend upon the circumstances. As circumstances vary from time to time, it is important first to inquire to what particular time the investigation is to be directed. The history of the Act of 1894, as well as its language, when carefully considered, makes this clear. I will deal only with its language. Upon that I have come to the conclusion (against my first impression) that the point of time to be considered is the time when the increase is made. By s. 1, sub-s. 1, it lies on the company to prove "that the increase of the rate or charge is reasonable"; and by sub-s. 3 this Court is given jurisdiction "with respect to any such increase of rate or charge." The increase of the rate or charge is the act of raising it from a lower sum to a higher sum. "The increase" is the sum by which the rate is increased, and the reasonableness of this act and this sum must depend upon the circumstances then prevailing. The reasonableness of the act can only be determined by the circumstances then existing, and by considering the charge before and after the raising with reference to the services rendered and to be rendered, the expenses of performance, and every other fact with relation thereto. Sub-ss. 4 and 5 point in the same direction. Sub-s. 4 makes "the rate in force immediately before the increase" the measure of the provisional payment to be made pending proceedings, or in the case of a repeated increase the rate in force in 1892. This view is supported by the authority of Collins J. in *Rickett, Smith's Case* (2), and is, I think, involved in the argument of Sir Frederick Peel in *Black* v.

(1) [1907] 2 K. B. 191.
(2) [1896] 1 Q. B. 260; 9 Ry. & Ca. Tr. Cas. 107.

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Caledonian Ry. Co. (1) There he was considering an increase made in 1899, before the increased cost of the services which occurred in 1900 had accrued, and he held in 1901 that an anticipated cost which had already in large part passed away did not justify that increase. I regret that the Act should have to receive so narrow a construction, but, when read with reference to the Act of 1888 (see s. 5), s. 24, sub-s. 10, and the Report of the Commission which led to its enactment, I think it is clear that it did not intend to confer any general jurisdiction upon this Court to investigate the reasonableness of rates.

The increase in question here took place on August 1, 1900, and it is into the circumstances then existing that our investigation must, in my opinion, be made in order to determine its reasonableness. It was proved that the rate now in question—or in effect upon the freighters a higher rate—had been in force for years before the reduction in 1895 was made. That reduction was made at a time of great depression in the coal trade. It was proved by evidence that was unquestioned that it was made at the earnest solicitation of the colliery owners in order to keep the collieries open for the common good of both collieries and railway companies. The expenses of the railway companies were at that time (1895) exceptionally low—for example, they were paying for locomotive coal only 6*s.* 9*d.* per ton. In the year 1900, when the rates were raised, the circumstances were wholly different. The South African war was proceeding. The cost of everything in connection with railway working had largely increased, and the price of locomotive coal had risen to 14*s.* 3*d.* per ton. An increase in the rates of freight was therefore to be anticipated at that time. No fact was proved in evidence, or suggested in cross-examination, to render the increase unreasonable when made. When in 1904 a reduction was again made in respect of the ports upon the Mersey other than the two now in question, the circumstances had again somewhat changed. It was said that the inconsistency of the railway companies in 1904 in treating these two ports differently to the others led to the inference that this rate was unreasonable. I do not think the acts of the railway company in 1904 are relevant for reasons

(1) 11 Ry. & Ca. Tr. Cas. 176.

already appearing. In any case, I am unable to adopt that conclusion; in 1892 the rate was a group rate, and the services performed at the ports were different from those now performed there. A detailed comparison of the rates charged and the services rendered by the railway companies at the several ports would be necessary in order to supplement this argument before any conclusion could be come to upon it. The complainants here called no evidence, but confined themselves to argument and to cross-examination, none of which appears to me to shake the testimony of the two witnesses called for the railway companies. The only matter which has caused me any difficulty was the admitted fact that these two ports were excluded from the concession of 1904 to some extent in deference to an agreement with the Great Western Railway Company as to their rates to the North Wales collieries. No such arrangement can, of course, have any weight whatever in establishing the reasonableness of these rates. In the absence of any evidence suggesting that these rates were unreasonable in 1900, when the increase was made, and believing, as I do, the evidence called for the railway companies, I think there were other facts which explained the retention of the higher rate in the case of these two ports. Among other things, I am influenced by the evidence that the rates to these two ports then stood on a lower basis than those to the ports to which the 1904 reduction was granted, and by the fact that the railway companies are now paying 11*s.* per ton for their locomotive coal as against 6*s.* 9*d.* in 1895.

Mr. Balfour Browne contended very strenuously that such considerations could not be admitted to have any influence, because the railway companies had not given particulars pursuant to an order for particulars made in the matter of this complaint. I think this view presses technicality beyond the limits of reason. The order of this Court contemplated particulars, if details of cost or other such matters were to be adduced in proof of the reasonableness of the increase of 1900. The general considerations to which the evidence for the railway companies was directed could take neither colliery owners nor counsel by surprise. They were indeed largely matters of common knowledge. I think that the railway companies have successfully discharged the onus of

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proof, and, as the applicants have given no evidence themselves, I come to the conclusion upon the evidence now before me that the increase of these rates was reasonable.

THE HON. A. E. GATHORNE HARDY read the following judgment:—In this case I entirely agree with the judgment of A. T. Lawrence J. The statute which we have to interpret lays down no rules to fetter our discretion in determining whether the railway companies have justified their action in raising the rate in 1900. In each case we must be guided by the particular facts brought before us. Here we are not dealing with the raising of an old-established rate, but merely with the restoration of one reduced under special circumstances in 1895. What were these special circumstances? The evidence of the two witnesses, who deposed that the reduction was made at a period of great depression in the coal trade in response to an urgent appeal of the colliery owners and in order to keep the pits open for the common benefit of the colliery owners and the railway companies, was undisputed. It was essentially reasonable that, when the railway companies were obtaining the benefit of an exceptionally cheap supply of coal, with the consequent reduction of their working expenses, they should be ready to comply with such an appeal. It seems to me to follow that the parties ought to have contemplated a return to the old rate when the special reason ceased, and that in 1900, the time of the Boer war, when the mines were as prosperous as they were depressed at the time of the reduction, and the companies were paying an inflated price for coal, it was essentially reasonable for the companies to revert to a figure approximating to the original rate. The reduction was a special concession made under special circumstances, and discontinued when they were reversed. If this had been an old-established rate, the consideration that weighed with Sir Frederick Peel in *Black* v. *Caledonian Ry. Co.* (1) might have operated on my mind; and I should have hesitated to act upon the rise of coal alone in view of the fluctuating character of its cost.

This disposes of the case if the point of time to be considered

(1) 11 Ry. & Ca. Tr. Cas. 176.

is the time when the increase was made. On this point also I agree with A. T. Lawrence J. It seems to me to be established by the language of the statute and the principles of construction usually adopted. The increase which we are asked to disallow is an increase "as from August 1, 1900," and after some attempt to found a justification on acquiescence that contention was withdrawn in the course of the argument, and it was admitted that the correspondence contained a continuous protest dating from the original period of the increase. This construction of the statute seems to me to be borne out by the judgment of Lord Collins, then Collins J., in *Rickett, Smith's Case* (1) and by the subsequent authorities. But even if this view of the law were not correct, and we were at liberty to consider facts subsequent to the date of the increase, I should still agree with the learned Judge that the difference between the treatment accorded to Ellesmere Port and Birkenhead and the other ports is sufficiently accounted for by the alteration of the group rate and the low basis at which the rates of these two ports stood before the reduction of 1895. I also think that we may attach some weight to the fact that these two ports alone are in direct competition with the North Wales collieries, although I am not influenced by any agreement between the competing companies. With regard to our order for particulars, I do not think that it was intended to have the wide operation contended for by Mr. Balfour Browne, and I do not think that the applicants were in any way surprised or taken at a disadvantage by the course taken at the hearing. On the whole, therefore, I agree that the defendants have satisfied the onus laid upon them, and have justified the increase of the rate.

SIR JAMES T. WOODHOUSE read the following judgment:—It is my misfortune to have arrived at a different conclusion from that which has been expressed by my colleagues. The applicants are in this case an association of traders who consign coal from their collieries in North Staffordshire over the railways of the defendant companies, and they complain that certain increases in the rates for coal and coke jointly made by the defendant railway

(1) [1896] 1 Q. B. 260; 9 Ry. & Ca. Tr. Cas. 107.

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companies on August 1, 1900, to Ellesmere Port and Birkenhead are unreasonable.

The complaint is made under s. 1 of the Railway and Canal Traffic Act, 1894, and a preliminary legal objection which was taken by the defendants that, as the increased rates did not exceed those which were in force between the same places on December 31, 1892, s. 1 of the Railway and Canal Traffic Act, 1894, did not apply, has been determined by the Court of Appeal in favour of the applicants. (1) The onus, therefore, of shewing that the increase of rate complained of is reasonable rests upon the defendants. The coal rates in force on July 31, 1900, to Ellesmere Port from a widely extending group of five collieries in North Staffordshire, named Harecastle, Tunstall, Adderley Green, Podmore, and Apedale, were raised on August 1, 1900—as to the first three collieries by 2*d.* per ton, as to Podmore by 3*d.* per ton, and as to Apedale by 4*d.* per ton, and the coke rate from Adderley Green was similarly raised 2*d.* per ton. In all cases these rates included tipping. Similarly the coal and coke rates in force on July 31, 1900, to Birkenhead from another group of collieries, comprising Harecastle, Tunstall, Etruria, Trentham, and Weston-Coynet, were all raised on August 1 by 2*d.* per ton, but to this port the rate did not include tipping services. It appears that the rates existing from the collieries in question on December 31, 1892, were reduced in the month of April, 1894, as regards Ellesmere Port by 3*d.* per ton, i.e., from 2*s.* 9*d.* to 2*s.* 6*d.*, exclusive of tipping. In November, 1895, in consequence, it is said, of strong representations made by the colliery owners as to the bad state of trade then prevailing, a similar reduction was made in the coal rates to Birkenhead and other ports. In 1896 the rate to Ellesmere, which had hitherto been exclusive of tipping, was altered so as to include tipping, and this service represented 3*d.* per ton. In August, 1900, the defendants raised the rates to practically what they were before the reduction in 1894, with this difference with respect to Ellesmere, that the increased rate included tipping. The colliery owners appear to have continually protested against this increase, and to have lodged their complaints with the Board of Trade;

(1) [1907] 2 K. B. 191.

and as a result of negotiations between the parties the rates were by arrangement put back as from July 1, 1904, as regards all the ports except Ellesmere and Birkenhead, to the same position as they were in by the reduction in 1895, with a stipulation in favour of the traders that the rates to Birkenhead and Ellesmere from North Staffordshire should be reduced if the rates to those places from North Wales were modified, whilst liberty was specially reserved to the traders to again raise the question of these last-mentioned rates to Ellesmere Port and Birkenhead in March, 1905. The increase of rates in August, 1900, to these two ports has, however, been maintained, and the question we have to decide is whether that increase is justified.

The defendants' counsel claimed to justify the increase—first, on the ground that it had not raised the rates to a higher level than they were on December 31, 1892; secondly, on the ground of increased cost of working to the defendants by reason particularly of the higher price of locomotive coal at the time the increase was made; thirdly, on the ground of an arrangement or understanding with the Great Western Railway Company not to lower the North Staffordshire rates unless that company reduced their rate from certain competitive collieries in North Wales; and, lastly, on the ground that certain concessions had been made to Birkenhead and Ellesmere Port which placed these ports in a more favourable position than other Mersey ports.

It was contended by Mr. Cripps for the defendants that in determining the issue before us we are not entitled to take into consideration what transpired after 1900, when the increase was made, and the fact that conditions admittedly prevailed very shortly afterwards, namely, in 1904 and 1905, differing from those which had prevailed in 1900, and that reductions had consequently been made by the defendant companies in the rates to other adjoining ports from these collieries after complaint by the applicants, were not circumstances which were relevant to the issue before us.

I cannot, however, with great deference to the learned counsel's eminence as an authority on railway law, for myself accept this view. It seems to me to unnecessarily and unduly circumscribe the limit of what it may be material to consider

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to enable the Court to arrive at an accurate judgment as to whether an increase is or is not reasonable. Nor do I find any authority for the proposition so broadly stated. On the other hand, Wright J. in *Smith & Forrest* v. *London and North Western Ry. Co.* (1) said : "In considering, under the provisions of the Act of 1894, whether an increase of a rate has been reasonable, we are not, in my opinion, precluded from having regard to any circumstances which may tend either to justify the increase or to prove it unreasonable." If, moreover, as held by Collins J. (now Lord Collins) in *Rickett, Smith & Co.* v. *Midland Ry. Co.* (2) circumstances which only are apprehended before an increase is made may be considered in determining whether an increase is justified, it would appear difficult, if not impossible, to exclude what takes place after the increase in determining whether the apprehended circumstances, which might in fact never have been realized, were a sufficient ground to justify the increase as reasonable.

It is also quite clear that in the Scotch coalmaster's case in 1901, *Black* v. *Caledonian Ry. Co.* (3), the Court did take into their consideration facts and circumstances subsequent to the date of the increase, and that these contributed largely to determine its decision. I think, therefore, that what took place subsequent to 1900 ought not to be excluded from our consideration. It is said here that, though the rates to Ellesmere and Birkenhead were raised in 1900 above what they were in 1895, such increase did not raise them higher than they had been in 1892, and that the level of 1892 is a prima facie standard of reasonableness ; but for the purposes of this case, as I understand the decision of the Court of Appeal, what we have to compare is 1900 with 1895, and not 1900 with 1892. I think in applying the test of reasonableness one of the chief elements for consideration is whether, the service being the same, the extra charge is required by and is commensurate with the additional cost of working the particular traffic : *Rickett, Smith & Co.* v. *Midland Ry. Co.* (2) Upon that point, the onus being on the defendants, the evidence, in my judgment, is not of such a

(1) 11 Ry. & Ca. Tr. Cas. 156, at p. 161.

(2) [1896] 1 Q. B. 260 ; 9 Ry. & Ca. Tr. Cas. 107.

(3) 11 Ry. & Ca. Tr. Cas. 176.

convincing character as to warrant me in saying that they have satisfactorily discharged that onus. It is true that they have in general terms given evidence that the price of locomotive coal was higher in 1900 than it was in 1895, and that expenses generally had gone up, but it would not, I think, be giving effect to either the intention of the Act or to the spirit of decided cases if we were to rely upon a general statement of this character as sufficient to justify an increase. It should not be overlooked that an order was made by this Court that, if the defendants intended to rely for justification on any change in mode or expense of carrying coal, they were to give the applicants by June 29, 1907, particulars of the same with copies of any figures on which they relied. No such particulars were ever given. It has been the practice, as far as I can gather, where such a defence has been relied on, for the Court to be furnished with detailed and cogent proof before effect has been given to it. This is important, because it has been laid down by this Court that, whilst increased cost of working is an element in determining the question of reasonableness, that is not alone sufficient. This was pointed out in *Smith & Forrest* v. *London and North Western Ry. Co.* (1) by Sir Frederick Peel, who said: "It lies on the respondents to prove that it was reasonable, and the circumstance they rely upon to justify it is increase in cost of working. This is, no doubt, an element to be regarded in determining reasonableness, but it is not, I think, to be regarded to the exclusion of other elements, such as receipts and net revenue." Similarly Lord Cobham, in *Rickett, Smith & Co.* v. *Midland Ry. Co.* (2), said: "I think that under several heads, and chiefly those of wages and salaries and locomotive coal, the defendants have proved that the cost of working their coal traffic increased between 1880 and 1892. To some extent this increase must have been general, and must have applied more or less to the applicants' traffic. But to prove this is not sufficient for the defendants' purpose; they must shew that the increased rate fairly corresponds with the increased cost of working the traffic on which it is charged, and here, I think, they have failed to discharge the onus which the

(1) 11 Ry. & Ca. Tr. Cas. at p. 168. (2) 9 Ry. & Ca. Tr. Cas. at p. 132.

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law has put upon them." In this case we have no particulars and no proof whatever of what the increased cost of working the traffic is; we have merely a general statement that expenses have gone up. It was quite possible, from the way the railway companies keep their accounts since the Act of 1894, for them to shew satisfactorily in detail what was the rise in the cost of carrying this traffic if they had really intended to rely on this as a ground of justification. Again, the principle is clearly laid down in *Black's Case* (1) by Lord Stormonth Darling and Sir Frederick Peel that where increased cost of carriage arises from causes of a fluctuating or transitory character, as, for example, an increase in the price of coal, such a cause is not sufficient to justify a permanent increase of rate. In that case Sir Frederick Peel said (2): "There was, it is true, the likelihood that the price of locomotive coal would rise very much in 1900, and the figure to which it did rise in the latter half of that year, and the extent to which the rise affected the cost of working, might have made an increase of the rates, while it lasted, reasonable enough. But to justify a permanent increase of rate, changes affecting only temporarily cost of working are not sufficient, and coal is an item of expenditure as to which experience has shewn that high prices do not last, and already in June of this year, when this case was heard, the price had fallen very considerably, and was scarcely more than half of what it had been."

The history of the coal trade has been one of long periods of low prices followed at considerable intervals by short periods of inflated prices, and in the absence of more satisfactory and convincing evidence than has been given in this case I adopt and accept the principle embodied in *Black's Case* (1), and I do not feel justified in holding that the defendants have satisfactorily discharged the onus cast upon them. But a careful perusal of the evidence convinces me that these rates were increased, and the increases were maintained to the two ports in question for entirely different reasons. It has been pointed out that the increase made in 1900 was reduced in 1904 to all the other ports except these two. What is the explanation of Mr. Phillips, the general manager of the North Staffordshire Railway Company,

(1) 11 Ry. & Ca. Tr. Cas. 176. (2) Ibid. at p. 194.

as to this? He says, at question 57: "In 1904 there was, of course, a great reaction after the war, and things went tumbling down very seriously. The colliery companies then came again and said, 'Times are just about now as they were in 1895, and we think you ought to go back again.' We accepted that view of the matter, as far as we were able to do so, but excepted Ellesmere Port and Birkenhead." In explaining why these two ports were excepted, he said, at question 59: "It was rather a question of competition with the North Wales collieries. As long as the Great Western Railway Company kept up the rate to the North Wales collieries we did not think we should be doing any harm by keeping up our rates also." Being asked, on cross-examination, question 100, whether he could not have reduced the rates, he said: "I did not say we could not reduce them. I said we did not reduce them because the Great Western Railway Company had not reduced the Great Western rates"; and at question 105 he further replies: "When the general advance in the rates was made we came to an arrangement with the Great Western Company that they should also advance their North Wales to Birkenhead rates, and we were honourably bound not to reduce unless and until they reduced. Now you have the whole story." Mr. Balfour Browne then asked him if it was not an arrangement between the two companies to keep up the rates as against the traders, and he replied, "It looks very like it." In re-examination by Sir Robert Finlay as to the reason for maintaining these rates to the two ports, he admits that "the most important fact" was the honourable understanding between him and the Great Western Railway Company. Now this (which in my judgment forms the defendants' real justification as to the rates in question) appears to me to constitute one of those very combinations which Fletcher Moulton L.J. had in his mind when, in giving judgment on the preliminary question as to the construction of the section on which our jurisdiction is founded, he said (1) the Act was intended "to prevent rates being raised unreasonably by combinations between competing railways, which is one of the gravest dangers of private railway management, and this alone would be sufficient to make such

(1) [1907] 2 K. B. at p. 210.

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legislation a valuable protection to traders." Mr. Phillips's candid admission to my mind supplies the key to the real ground of justification in this case, and in my judgment it is not one which, having regard to the judgment of the learned Lord Justice, is entitled to prevail. For my own part, therefore, I think the defendants have not discharged the onus resting upon them, and that the applicants are entitled to judgment.

Application dismissed.

Solicitor for applicants: *M. A. Orgill, for J. H. Knight, Newcastle-under-Lyme.*

Solicitors for North Staffordshire Railway Company: *Burchells.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

Solicitor for London and North Western Railway Company and Shropshire Union Railways and Canal Company: *C. de J. Andrewes.*

F. O. R.

C. A.

1907

June 7.

[IN THE COURT OF APPEAL.]

LONDON AND INDIA DOCKS COMPANY *v.* THAMES STEAM TUG AND LIGHTERAGE COMPANY.

Ship — Dock Company — Exemption from Dock Rates — Lighter — "Bona fide engaged in discharging or receiving Goods to or from on Board of a Ship"—West India Dock Act, 1831 (1 & 2 *Will.* 4, *c. lii.*), *s.* 83.

By a section of a dock company's Act it was provided that "all lighters or craft entering the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates, so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid."

Where a lighter was taken into one of the company's docks with the bona fide intention of discharging goods into a certain vessel then lying in the dock, but, after waiting alongside the vessel to discharge for some time, was unable to do so, in consequence of the vessel's loading being complete, and thereupon went out of the dock with her cargo undischarged:—

Held, that the lighter was, while in the dock, bona fide engaged in

discharging goods to a vessel lying in the dock within the meaning of the above-mentioned section, and therefore the exemption thereby conferred applied to her.

APPEAL by the plaintiffs from the judgment of a Divisional Court (Kennedy J. and A. T. Lawrence J.), affirming a decision of the judge of the City of London Court.

The action was brought to recover the sum of 1*l.* 11*s.* 6*d.* for dock rates alleged to be chargeable in respect of two barges belonging to the defendants for entering a dock belonging to the plaintiffs.

It appeared that two barges belonging to the defendants entered the dock laden with goods which were bona fide intended to be discharged into a vessel called the *Umfuli*, which was then lying in the dock for the purpose of being loaded. They lay alongside the vessel, waiting to discharge into her, until it was found that she was fully loaded and could take no more cargo on board. The barges thereupon at the first opportunity left the dock, without having discharged any of the goods on board of them. It was not disputed that the circumstances were such that the defendants were reasonably entitled to expect that the goods would be received on board the *Umfuli*.

It was contended on the part of the plaintiffs that the defendants were liable in respect of these barges to pay the rate in force for entering the dock under the West India Dock Act, 1831. The defendants contended that they were entitled to exemption from the dock rate by virtue of s. 83 of that Act. (1)

(1) By the West India Dock Act, 1831 (1 & 2 Will. 4, c. lii.), it was provided as follows :—

Sect. 76 : "And be it further enacted that the said company shall and may take or receive for or in respect of every ship or vessel entering into any of the said docks, basins, locks, or cuts, or lying therein or departing therefrom, such reasonable rate, rent, or sum for every ton, according to the register tonnage of such ship or vessel, as the said directors shall from time to time appoint; and it shall be lawful for the said company to take further reasonable rates or sums for the unloading, coopering, or mending of the cargoes of such ships or vessels, or other work which may from time to time be performed by the said company in respect of such ship or vessel; and the said company shall and may also take or receive, for or in respect of every lighter, barge, or craft entering into any of the said docks, basins, locks, or cuts, or lying therein, such reasonable rate, rent, or sum not exceeding the rate, rent, or sum which may at the same period be payable by ships

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The learned judge of the City of London Court gave judgment for the defendants, and the Divisional Court affirmed his decision.

J. A. Hamilton, *K.C.*, and *E. C. Bliss*, for the plaintiffs. The words of exemption contained in s. 83 must be construed strictly: see *In re Silver Valley Mines* (1); and in their natural meaning they only apply to the case of a lighter which, having entered into the dock for the purpose of discharging or receiving goods into or from a vessel lying therein, actually does so discharge or receive. The reason of the exemption is that, it being an advantage both to shipowners and the dock company that there should be facilities for loading and unloading ships in the docks, in consideration of the service a lighter renders in loading or unloading a ship, it is exempted from any payment for the use of the dock and the services of the dock company's servants; but the latter services have to be rendered in any case, and, if no services are in fact rendered by the lighter to any ship in the dock, the reason for the exemption does not arise. These barges cannot be said to have been bona fide engaged in discharging goods into a ship lying in the dock; at the most they were only trying to do so. It would not be a reasonable construction of the section to hold that any lighter which comes into the dock in the

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or vessels trading coastwise between the port of London and any port or place in the United Kingdom, as the said directors shall from time to time appoint."

Sect. 80: "And be it further enacted that the said company shall and may take or receive for every article of goods, wares, or merchandise, which shall be brought into, or landed or deposited within, or delivered or shipped from, the said dock premises, such reasonable rates, rent, or sums as the said directors shall from time to time appoint, for and in respect of wharfage, unshipping, landing, relanding, piling, housing, weighing, coopering, sampling, unpiling, unhousing, watching, shipping, loading, and delivering of every such article, and of other work to be performed in respect of such goods."

Sect. 83: "Provided always, and be it enacted, that all lighters and craft entering into the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid, and also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

(1) (1881) 18 Ch. D. 472.

hope of discharging or receiving goods into or from a ship, and which waits about in the dock for that purpose, should be entitled to the exemption. Such a construction would, as a matter of business, be most inconvenient, and detrimental to the interests of the company. At the time of entry the existence of the bona fide purpose of discharging or receiving goods into or from a ship lying in the dock is sufficient for the purpose of initiating the right to exemption, but, in the event of the condition subsequently mentioned in the section never being fulfilled, the right of exemption ultimately never comes into existence. The provision at the end of s. 83 shews that the "discharging" and "receiving" contemplated by the words "bona fide engaged in discharging or receiving" is an actual discharge or receipt, because it obviously contemplates that goods will be actually discharged or received. In *Knight Bevan and Sturge* v. *London and India Docks Joint Committee* (1) Wills J. appears to have thought that the exemption depends upon there being ultimately an actual discharge or receipt of goods from or by the lighter into or from the ship or vessel.

Scrutton, K.C., and *Cranstoun*, for the defendants, were not called upon to argue.

VAUGHAN WILLIAMS L.J. I think that the decision of the Divisional Court in this case was right. The question raised appears to me to depend entirely on the construction of s. 83 of the West India Dock Act, 1831, the material words of which are as follows: "so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid." Before, however, I deal with the construction of those words, I wish to say, with regard to the words at the end of the section, "and also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever," that, in my opinion, those words are introduced solely with reference to the provisions of s. 80 as to rates on goods shipped from or landed on the dock premises, and have no bearing whatever upon the construction of the words upon which this case depends, which I think ought to be construed quite independently

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of those words at the end of the section, which really are dealing with a different subject-matter. That being so, let us see what is the meaning of the words "bona fide engaged in discharging or receiving such ballast or goods as aforesaid." I do not think that any one has gone the length in this case of saying that, upon the true construction of these words, they mean that the exemption shall not apply in a case where, for some reason or other, the discharging or receiving goods from or into a lighter has been delayed by reason of the condition of a vessel into or from which the goods were to be discharged or received by the lighter. As I understand the judgment of Wills J. in *Knight Bevan and Sturge* v. *London and India Docks Joint Committee* (1), he himself excluded that construction; for he appears to have said that the exemption applied, not merely to the time during which the physical act of discharging or receiving was actually being performed, but to the whole time covered by the process of discharging or receiving. According to my understanding of the words "bona fide engaged in discharging or receiving," they apply so long as the lighter which entered the dock or basin bona fide for the purpose of discharging or receiving goods into or from a ship or vessel lying therein continues therein for that purpose. In my view, as soon as a lighter enters into the dock bona fide for the purpose of discharging or receiving goods into or from a vessel lying in the dock, she is engaged in discharging or receiving goods within the meaning of the section. The exemption of the lighter begins the moment that she enters the dock for the purpose of discharging or receiving goods into or from a vessel lying therein; and the meaning of the section is, I think, that, when a lighter has entered the dock or basin qualified for the exemption, because she has bona fide entered for this purpose, so long as that qualification for exemption lasts the exemption itself will last; and it is not true to say, either in respect of the first entry of the lighter into the dock or basin or in respect of the continuance of the exemption, that it only lasts so long as, or only applies in respect of time during which, goods are being physically discharged or received. Practically this construction does not impose any hardship on the dock company with

(1) Unreported.

regard to the conduct of their business. It is competent for the dock company, if they think fit, to make a rule that every lighter which enters into the dock, for the alleged purpose of discharging goods into or receiving goods from a vessel lying therein, shall specify the name of the vessel into which or from which it is going to discharge or receive goods. The result would be that, if a lighter sought to enter the dock, not really for the purpose of discharging or receiving goods into or from a vessel lying therein, but for the purpose of seeing whether it could pick up a job there, as soon as that fact was ascertained, the dock company would be entitled to say that there was no exemption, and the lighter must pay the dock charge. I really do not think that it is necessary to say anything more with regard to the construction of the words of s. 83; but I should like to add that, as I understand his judgment in *Knight Bevan and Sturge* v. *London and India Docks Joint Committee* (1), not only did Wills J. abstain from any construction of those words which involved saying that the exemption only lasted as long as the physical act of discharging or receiving goods is continuing, but he expressly refused to put such a construction on the words as would involve that it was necessary that the vessel into or from which the goods were to be discharged or received should always be ready during the whole time that the lighter was in the dock to discharge or receive goods, as the case might be. The learned judge seems to have felt that such a construction of the section was impossible. As I understand his judgment, what he does say is that, if a lighter enters, and enters at a time when the vessel is not ready to discharge or receive, as the case may be, the application of the exemption will only arise in a case where ultimately the vessel is ready to discharge or receive, and does in fact discharge or receive, goods into or from the lighter. I cannot myself find any words in the section which do in any way express such a condition of the exemption. I do not find anything in the section which involves that the exemption is only to apply in cases where there is an actual discharge or receipt of goods by the lighter into or from a vessel; and it seems to me that, if the Legislature had intended to make an actual discharge or receipt of goods into or from a

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vessel a condition of exemption, they would have worded the section very differently. Instead of saying, "be it enacted that all lighters and craft entering the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt," &c., I think they would have said, "All lighters and craft entering the said docks, basins, locks, or cuts, and in fact discharging or receiving ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt," &c. The Legislature have not so expressed it. They begin the provision relating to the exemption with words which merely import the entry of a lighter into the dock for a particular purpose. Bearing that in mind, when we come to construe the words "bona fide engaged," &c., in my judgment we ought to read them as covering the time during which the lighter, which has entered into the dock for the purpose of discharging or receiving goods into or from a vessel lying therein, has remained there for that purpose, and ought not to read them as only conferring the exemption where there has been an actual discharge or receipt of goods by the lighter. For these reasons I think that the appeal ought to be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons. The question turns entirely upon the construction of s. 83 of this particular Act of the dock company, which section relates to the exemption of lighters from dock rates under certain circumstances. The section, so far as it relates to lighters and craft, consists of two parts. The first part deals with the question what lighters or craft are exempted on entering the dock, and the second with the question how long the exemption continues. Taking the first part, we find that the qualification which initiates or originally gives rise to the exemption depends on the purpose with which the lighter or craft enters the dock. The relevant words are, "all lighters and craft entering into the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates." Therefore the question to be decided in the first instance, in order to find out whether a lighter is exempt from

dock rates, is the question whether it entered the dock to discharge or receive ballast or goods as mentioned in the section. There is no question in the present case that these barges entered to put goods on board of a vessel lying in the dock. Therefore, if, as in my opinion is the case, the question of exemption on entrance must be decided by reference to the circumstances which existed at the moment of entrance, that is to say, by reference to the purpose with which the lighter entered, it cannot be denied that the barges in this case were entitled to exemption on entry. The decision of the case therefore depends on the second part of the section, which deals with the question how long the exemption so acquired continues. It is to continue so long as the lighter continues to possess the qualification of being "bona fide engaged in discharging or receiving such ballast or goods as aforesaid." What is the meaning of that phrase? Every one concedes that a lighter entering to discharge goods into a vessel lying in the dock, waiting about for that purpose, and in the end actually so discharging the whole or some of its contents, and then going out again, continues to possess a qualification for exemption throughout the whole of the time so occupied—in other words, that "waiting to discharge" satisfies the words "bona fide engaged in discharging." But the plaintiffs contend that, although the terms of the section import that the exemption is to continue as long as this qualification for exemption lasts, there may be, as it were, an ex post facto defeasance of the qualification, if the lighter does not ultimately succeed in discharging any of her cargo. To take an example: two barges enter the dock, each for the purpose of discharging its cargo into a ship lying in the dock. They both wait about bona fide for that purpose. Therefore they are both during the whole of the time so occupied equally within or without the scope of the section. One succeeds in discharging some of her cargo into the ship, and therefore remains in possession of the qualification for exemption, and goes out without having become subject to the dock charges. The other does not succeed in discharging any of her cargo. According to the plaintiffs' contention, she must be treated as if, during the whole of the time that she has been in the dock

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under exactly the same circumstances as her successful companion, she had not possessed the qualification of being bona fide engaged in discharging goods within the meaning of the section. I do not believe that there is anything in the section which points to an ex post facto defeasance of that kind. If that had been intended, it would certainly have been expressed in plainer language. I think the meaning of the section is that a lighter which possessed a qualification for exemption at the time of entry into the dock, by reason of the purpose for which she entered, namely, that of discharging or receiving goods into or from a ship lying therein, shall continue to possess that qualification as long as she remains in the dock bona fide for that purpose, and that the exemption is not taken away by any subsequent event, namely, by her not succeeding in effecting that purpose. I only wish to add one more observation. It appears to me that, in considering the meaning of the words which in this case describe the qualification for exemption as being that the lighter should be "bona fide engaged in discharging or receiving," it may fairly be said that, inasmuch as the initiation of the qualification for exemption depends on intention, namely, on the fact that the lighter enters with the intention of discharging or receiving into or from a ship, that renders it probable that the continuance of the qualification similarly depends on intention, and that, as long as the lighter continues in the dock with the bona fide intention of discharging or receiving, the words of the latter portion of the section are satisfied and she continues exempt. I am therefore of opinion that these barges were throughout exempt from dock rates.

With regard to the words at the end of the section relating to goods, I entirely agree with what Vaughan Williams L.J. has said as to them. I think they merely make provision that no charge shall be made in respect of goods on board such lighters in the only case in which they would be liable to be charged, that is to say, when they had either been shipped or unshipped.

BUCKLEY L.J. Upon the words of s. 83 the plaintiffs have raised an argument to the effect that the discharging contemplated by the section is a discharge in point of fact, and that

there is therefore no exemption unless the lighters in question have in fact discharged goods. In my opinion that argument fails. I wish, in the first place, to clear away any difficulty which may arise from the concluding words of s. 83. Their effect is, I think, as follows. By s. 76 the dock company are empowered to impose rates on vessels or lighters entering the docks, varying in the case of vessels according to their register tonnage. Sect. 80 provides also for rates on goods, and, as I read the section, it is confined to goods in respect of which some work has been performed. If a vessel entered the dock with goods in her hold, which remained there throughout the time that she was in the dock, and then went out with them still on board, no rates could, I think, be charged under s. 80 in respect of those goods. In order that rates may be chargeable under the section upon goods, they must be goods in respect of which work is done in the nature of shipment or unshipment, such as loading, landing, or delivering—goods which are handled in some way on the dock premises. In that state of things the concluding words of s. 83 provide that, if goods are put on board a ship from a lighter, or taken from a ship into a lighter in a dock, those goods shall not be charged. They have been shipped or unshipped, and therefore would prima facie come within s. 80, but, if they are shipped from, or unshipped into a lighter, they are by s. 83 not to be charged. That is the whole effect, in my opinion, of those words.

Here we have to determine the effect in s. 83 of the words "bona fide engaged in discharging." The barges with which we have to deal entered the dock for the purpose of discharging goods into a vessel called the *Umfuli*, which was at that time lying in the dock, and with bona fide reason to believe that that vessel would be able to take those goods. They entered the dock on a definite piece of business, namely, carrying goods to a vessel, which they expected to receive them. I have not to do with the case of a lighter which enters a dock merely in the hope of finding a vessel to take her cargo. Under these circumstances did these barges, although they never did in fact discharge any cargo, possess a qualification for exemption from dock rates on the ground that they entered and were in the dock for the

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purpose of discharging goods into a vessel, and were therefore bona fide engaged in so discharging? Certainly they entered to discharge. Then were they bona fide engaged in discharging? I answer Yes. "They also serve, who only stand and wait." Those lighters are bona fide engaged in discharging, which only enter, and wait for the purpose of discharging, and leave again, although in point of fact they never do discharge. These barges were, in my judgment, engaged throughout bona fide in discharging, and none the less because in point of fact, through no fault of their own, no discharge ever took place. For these reasons I think that the judgment of the Divisional Court was right, and this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *E. F. Turner & Sons.*
Solicitors for defendants: *Keene, Marsland, Bryden & Besant.*

E. L.

1908 *Feb.* 5.

BAXTER'S LEATHER COMPANY *v.* ROYAL MAIL STEAM PACKET COMPANY.

Ship—Bill of Lading—Limitation of Shipowner's Liability—Loss due to Shipowner's Negligence.

The plaintiffs shipped goods on board the defendants' ship for carriage from London to Buenos Ayres under a bill of lading containing a clause which provided that the defendants should not be accountable to any extent for certain specified goods, which did not include goods of the kind shipped by the plaintiffs, "nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package." The plaintiffs' goods were lost in the course of the voyage through the negligence of the defendants. In an action to recover the full value of the goods:—

Held that, notwithstanding that the loss was due to the defendants' negligence, they were only liable to the limited extent provided by the bill of lading.

ACTION in the commercial list tried by Bigham J. without a jury.

The plaintiffs' claim was in respect of two cases of dressed

leather which were delivered by them to the defendants, and accepted by the defendants, for carriage in the defendants' ship the *Afghanistan*, from London to Buenos Ayres, upon the terms of a bill of lading.

On arrival of the ship at Buenos Ayres the cases could not be found, and the plaintiffs alleged that they had been lost through the defendants' negligence.

The defendants, by their defence, denied that they had been guilty of any negligence, and they relied on the following clause in the bill of lading: "7. That the master owners or agents of the vessel or its connections shall not be accountable to any extent for" (here followed a list of articles which did not include goods of the kind shipped by the plaintiffs), "whatever may be the value of such articles, nor for any other goods of whatever description, beyond the amount of 2*l.* per cubic foot for any one package, or relatively for any proportion thereof, nor in any case for any amount beyond the invoice price of the goods, unless shipment be made upon a special order containing a declaration of the value and the bills of lading are signed in accordance therewith, and extra freight as may be agreed upon be paid."

It was admitted that the shipment had not been made under a special order containing a declaration of the value, and the defendants paid into Court the sum of 16*l.* 10*s.*, being at the rate of 2*l.* per cubic foot for each of the cases.

The defendants called no witnesses.

J. A. Hamilton, K.C., and *F. D. Mackinnon*, for the plaintiffs. The bill of lading is evidence that the plaintiffs' goods were received on board the defendants' ship, and the failure to deliver them on arrival at Buenos Ayres is prima facie evidence that they have been lost through the negligence of the defendants' servants: *The Xantho* (1), per Esher M.R.; *Reeve* v. *Palmer*. (2) Then can the defendants, who have been guilty of negligence, take advantage of the provisions of clause 7 of the bill of lading for the purpose of limiting the amount of their liability? Shipowners who accept goods for carriage are under the same liability

(1) (1886) 11 P. D. 170. (2) (1858) 5 C. B. (N.S.) 84.

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as common carriers: *Liver Alkali Co.* v. *Johnson* (1); except in so far as they qualify that liability by the express terms of the bill of lading; but a clause limiting the amount of liability must itself be read as subject to the qualification that the shipowner exercises due care in the carriage of the goods: *Tattersall* v. *National Steamship Co.* (2); *Beck* v. *Evans* (3); *Smith* v. *Horne.* (4) In the present case the defendants have not by express terms protected themselves from liability for negligence, and, therefore, in the circumstances they cannot limit the amount of their liability under clause 7 of the bill of lading.

Scrutton, K.C., and *D. Stephens*, for the defendants. It is true that a shipowner, in the absence of a special contract, incurs the same liability as a common carrier; but a shipowner is not a common carrier, and the contract of carriage must be construed without reference to the common law liability of a common carrier. Clause 7 of the bill of lading entirely exempts the defendants from liability in the case of certain goods, and limits the amount of their liability "for any other goods of whatever description." The intention is to limit the defendants' liability in all cases in which they are liable, and one thing for which they are liable is negligence. *Tattersall* v. *National Steamship Co.* (2) is really a decision in the defendants' favour, for, though the Court held that the clause in the bill of lading limiting the amount of the shipowner's liability did not apply to a case of loss due to the shipowner's failure to provide a seaworthy ship, A. L. Smith J. pointed out (5) that the meaning of the clause was that the shipowner was to be under no liability for a loss unless occasioned by his negligence, and that for a loss so occasioned the amount of his liability was to be limited. In *Morris* v. *Oceanic Steam Navigation Co.* (6) Mathew J. held that a clause limiting liability applied even where the shipowner had failed to use due diligence to make the ship seaworthy. These authorities strongly support the view that clause 7 of this bill of lading applies to a case of loss through the defendants'

(1) (1874) L. R. 9 Ex. 338.
(2) (1884) 12 Q. B. D. 297.
(3) (1812) 16 East, 244.
(4) (1818) 2 Moore, 18.
(5) 12 Q. B. D. at p. 302.
(6) (1900) 16 Times L. R. 533.

negligence. *Beck* v. *Evans* (1) and *Smith* v. *Horne* (2) are not in point, for they were cases of common carriers, and also were cases where gross negligence was proved, and, that being so, a notice limiting liability would not protect a common carrier: *Riley* v. *Horne* (3), per Best C.J.; *Batson* v. *Donovan*. (4) Further, even if negligence deprives the defendants of the benefit of the clause, the onus is on the plaintiffs to prove negligence: *The Glendarroch* (5); and they have not discharged that onus.

Hamilton, K.C., in reply. *Beck* v. *Evans* (1) and *Smith* v. *Horne* (2) cannot be distinguished on the ground that they were cases of gross negligence. In neither case was the decision put upon that ground. The expression gross negligence, which Rolfe B. in *Wilson* v. *Brett* (6) said was the same thing as ordinary negligence with the addition of a vituperative epithet, is only applicable to cases of gratuitous service, and has no application to a case of carriage for reward, whether by land or sea. In *Tattersall* v. *National Steamship Co.* (7) A. L. Smith J. recognized the principle that an exception is prima facie contingent on the observance of due care, but he thought that the clause in that case, which contained the words "under no circumstances," was wide enough to protect the shipowner from liability for negligence during the voyage. The use of those wide words distinguishes that case from the present. *Morris* v. *Oceanic Steam Navigation Co.* (8) must be regarded as a case of an agreement to place a specified value on the goods carried, like a valued policy; in any other view it is in direct conflict with the whole course of authority. In *Wilson* v. *Owners of Cargo per the Xantho* (9) Lord Macnaghten said that, "Even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss." [He also cited *Leuw* v. *Dudgeon*. (10)]

(1) 16 East, 244.
(2) 2 Moore, 18.
(3) (1828) 5 Bing. 217, at p. 223.
(4) (1820) 4 B. & Ald. 21.
(5) [1894] P. 226.
(6) (1843) 11 M. & W. 113.
(7) 12 Q. B. D. 297.
(8) 16 Times L. R. 533.
(9) (1887) 12 App. Cas. 503, at p. 515.
(10) (1867) L. R. 3 C. P. 17, n.

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BIGHAM J. The facts of this case are quite simple. Certain goods of the plaintiffs were shipped in the defendants' ship, and consigned for delivery at Buenos Ayres. The bill of lading which was given by the defendants to the plaintiffs shews the contract under which the goods were to be carried. Clause 7 of the bill of lading, so far as material to the present case, is as follows: "The master, owners, or agents of the vessel or its connections shall not be accountable for . . . . goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package." I read that clause as a clause limiting the liability of the defendants even in the event of a loss through their negligence. I do not know, and it is not necessary for me to decide, whether under that clause the defendants' liability would also be limited in the event of a loss through their gross negligence. I am satisfied that there is no evidence of any gross negligence in this case. The only evidence of negligence of any kind is the mere fact that the defendants did not deliver the goods at their destination. To my mind the mere fact of non-delivery is equally consistent with there being no negligence, but the authorities shew clearly that non-delivery raises a prima facie presumption of negligence on the part of the shipowner, and therefore, in the absence of evidence to rebut that presumption, I must find as a fact that the loss of the plaintiffs' goods was due to the negligence of the defendants.

I think that the cases of *Tattersall* v. *National Steamship Co.* (1) and *Morris* v. *Oceanic Steam Navigation Co.* (2) support the view that the effect of clause 7 in this bill of lading is to limit the defendants' liability even in the event of a loss through their negligence. *Tattersall* v. *National Steamship Co.* (1) was a case in which cattle were being carried, and as they were to be shipped under the sole charge of the shipper's servants, it was stipulated by the bill of lading that the shipowners should be in no way responsible either for the escape of the cattle from the steamer or for accidents, disease, or mortality, and that under no circumstances should they be held liable for more than 5*l.* for each of the animals. It appeared that the ship provided by the shipowners in that case had on her previous voyage carried

(1) 12 Q. B. D. 297. (2) 16 Times L. R. 533.

cattle suffering from foot and mouth disease, and the result was that some of the cattle on the voyage in question became infected, and the plaintiff suffered damage exceeding 5*l.* in respect of each of the animals. The question was whether the shipowners were liable, and it was held that they were, because the clause in the bill of lading did not relieve them from their common law liability to provide a ship fit to carry the cargo intended to be carried in her. But then came the question, Were the shipowners nevertheless at liberty to say that their liability was limited by the last words of the clause in the bill of lading? In reference to that A. L. Smith J. said (1): "Then it is further stipulated on behalf of the shipowners that 'under no circumstances' shall they be liable to a greater extent than 5*l.* for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned they shall only be liable to the amount of 5*l.*" A. L. Smith J. there read the clause, which for all practical purposes was similar to that in the present case, in the same way as I read the clause in the bill of lading before me. In the case of *Morris* v. *Oceanic Steam Navigation Co.* (2) the words were: "It is also mutually agreed that the value of each package receipted for as above does not exceed the sum of $100, unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in s. 4281 of the United States Revised Statutes, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading." In reference to that clause Mathew J. said at the end of his judgment: "It was argued for the plaintiffs that the meaning of the clause was that there must be a declaration of value of above $100 in order that the freight might be properly adjusted, and that the only consequence of not stating the value was that the freight must be readjusted on the higher valuation." The learned judge did not think that that was the object or meaning of the clause, and he felt compelled to come to the conclusion that the

(1) 12 Q. B. D. 297, at p. 302. (2) 16 Times L. R. 533.

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clause was intended to limit the liability of the defendants in the event of a breach of their duty to use diligence to make the vessel seaworthy; that is to say, that the clause was intended to limit the liability of the shipowners even if the damage was due to their own negligence.

I do not think that anything that I have said in this case in the least degree conflicts with what Lord Macnaghten said in *Wilson* v. *Owners of Cargo per the Xantho* (1) as to the underlying obligation on a shipowner to use due care in carrying goods entrusted to him. It is no doubt true that, if a shipowner desires to protect himself against liability for the negligence of his own servants, he must do so in very plain terms; but, in my opinion, it is so difficult to apply the language of clause 7 to any circumstances but to a loss through the negligence of the defendants' servants, that I must hold that the clause does apply to a loss so caused. There will therefore be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Ballantyne, McNair & Clifford.*
Solicitors for defendants: *Holman, Birdwood & Co.*

(1) 12 App. Cas. at p. 515.

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[IN THE COURT OF APPEAL.]

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DOTHIE AND OTHERS *v.* ROBERT MACANDREW & CO.

Employer and Workman—Compensation—"Workman"—Ship's Captain—Remuneration—Board and Allowances in Addition to Cash Wages—Computation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

Sect. 13 of the Workmen's Compensation Act, 1906, provides that "workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year. Upon a claim for compensation by the widow and children of a ship's captain, who was accidentally killed by a tramcar at a port where his ship was in dock, it appeared that the remuneration of the deceased was 216*l.* a year in cash in addition to his board:—

Held that, in considering whether the remuneration exceeded the limit prescribed by the section, the test of the money value of the board provided by the owners was not what the captain saved by the arrangement, or, in other words, what he could have boarded himself for, but what the reasonable style of board provided by the owners would have cost him if he had had to purchase it himself.

APPEAL against the award of the judge of the Ilford County Court upon a claim for compensation by the widow and children of a deceased ship's captain under the Workmen's Compensation Act, 1906.

Two questions were raised upon the appeal—first, whether the deceased had met his death from an accident "arising out of and in the course of" his employment within s. 1, sub-s. 1, of the Act; and, secondly, whether he was a "workman" within the definition of s. 13, which provides that "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year."

The facts as found by the county court judge were as follows: The deceased was employed by the defendants, the owners, as master of the ship *Almagro*, a vessel coasting between London and Barcelona, calling at Antwerp both on the outward and homeward voyages. He was paid in cash 216*l.* per annum, and was provided while on board with his food and certain allowances for washing. He was accidentally killed while trying to get on to a tramcar in Antwerp, where his ship was berthed, and where he was seeking information with reference to certain deserters

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from the ship. The county court judge found on the evidence that the deceased met his death from an injury by an accident "arising out of and in the course of" his employment, and he also found that the allowance for board on the ship did not bring the deceased man's remuneration to more than 250*l.* per annum, and consequently that he was a "workman" within the definition of s. 13, and his dependants were entitled to compensation.

In considering whether the value of the board and allowances brought the deceased's remuneration up to an amount exceeding 250*l.* a year the county court judge took as the test of its value what the man saved by the arrangement, and, applying that test, he found that the remuneration was less than 250*l.* a year.

The owners of the ship appealed.

It was first argued on behalf of the appellants that the accident did not arise "out of and in the course of" the employment, but, as the Court did not consider it necessary under the circumstances to go into this question, that branch of the argument is omitted.

C. A. Russell, K.C., and *R. B. Murphy*, for the appellants. The county court judge has misdirected himself on the question whether the deceased was a "workman" as defined by s. 13. The point is not what Captain Dothie "actually saved by this allowance," as the county court judge found, but what is the fair money equivalent for the allowance of food and washing made to him by the owners; and this cannot be arrived at by considering what it would cost him to live at home, or what he "saved" by this arrangement. The county court judge seems to have confused "emolument" as defined in *Reg.* v. *Postmaster-General* (1) with "remuneration" as mentioned in that part of s. 13 which refers to the "remuneration" of the "workman" being under 250*l.* per annum. The true test is what was the actual value to the deceased of the reasonable board and allowances provided for him by the owners; and the case should be remitted to the county court judge to ascertain whether the "remuneration" calculated on that basis

(1) (1876) 1 Q. B. D. 658.

amounted to more than 250*l.* per annum. If it does, then the deceased was not a "workman," and there would be no jurisdiction to award compensation.

Alan Macpherson, for the respondents, was directed to confine his argument to answering the appellants' second objection to the finding of the county court judge.

The county court judge held that in order to calculate the value of the food as part of the deceased's remuneration it was necessary to consider what he actually saved by the arrangement. It is submitted that he was right. The true measure of the value of the food to him is what it would have cost him to provide reasonable sustenance for himself. It is not correct to take as a test the actual value of the food supplied, because the food might well be of better quality than what he might reasonably have provided for himself. For instance, wine was included in the food supplied, and the deceased did not take any. In putting a money value on the food it is necessary to consider what it was actually worth to the man, i.e., what he saved by having it provided for him instead of having to find it for himself. The cost price of the food supplied is not the true measure: *Great Northern Ry. Co.* v. *Dawson.* (1)

COZENS-HARDY M.R. This is an appeal against an award of his Honour Judge Tindal Atkinson, whose great care in dealing with these workmen's compensation cases makes me hesitate at all times to differ from him. There have been two points raised on the appeal. The master of a ship was run over at Antwerp by a tramcar, and it was argued before the learned county court judge that the master of the ship, the deceased man, was a "workman" within the definition of the Act of 1906, and that the accident arose "out of and in the course of" his employment. The learned county court judge gave an elaborate judgment on the main point of the case, which was probably more argued than anything else, namely, whether this accident was one which arose "out of and in the course of" the employment, and he also considered the question of whether it

(1) [1905] 1 K. B. 331, at p. 334.

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made any difference that the accident happened at Antwerp and not in this country.

We have heard the argument of the appellants upon that branch of the case. The points raised are undoubtedly points of interest and of very considerable difficulty, but, in the view which I take as to the other point, it is not necessary, and not being necessary I think it would not be right, to take up the time of the Court in listening to the respondents' argument on the first point if we arrive at the conclusion that the deceased was not "a workman" within the meaning of the definition in the Act. The definition in s. 13, as far as material, is this: "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year." Now the respondents' counsel admits that the burthen is upon him to shew that the deceased was a "workman" within the meaning of the Act. What was the deceased man's position? He had been for rather more than three years master of this vessel. It was a coasting vessel in a large sense of the word; it went to Spain and Portugal, calling at Antwerp, and back to England, making a good many voyages in the course of the year. He was a man against whose character and ability not a word has been said or suggested. He was a total abstainer. He met with his accident at a time when he was seeking information with reference to certain deserters from the ship at Antwerp. What was his pay? His pay was 216*l.* a year in cash. If that were all, of course he would still be a "workman" entitled to the benefit of the Act, but that is not all. He was spending the greater part of his life actually at sea in this vessel, and when not actually at sea he was in one or other of the ports at which she called; in fact, with the exception of a certain small number of holidays—a few days at a time in the year, when he was able to go home to his wife and family—he lived on board this ship. He got his food on board there, whether he was actually at sea or not; and it is not disputed, and it could not be disputed, on behalf of the respondents that, in considering whether he is a "workman," you must have regard to the fact that his remuneration was not merely 216*l.* in cash, but also board and lodging on board ship.

Now the learned county court judge has said this: "His cash salary was 216*l.* per year. It is contended that, being allowed his food and the washing of his bed linen and use of clean table linen in common with the officers, his remuneration exceeded 250*l.* a year. I think with regard to the food that in order to calculate its value as part of his remuneration it is necessary to consider what Captain Dothie actually saved by his allowance of food." And the learned county court judge, treating that as the test, says he is not satisfied that Captain Dothie actually saved sufficient to bring it up to 250*l.* He says: "I am satisfied on the evidence that the saving to Captain Dothie by allowance of food would not make his remuneration exceed 250*l.* a year."

With the greatest possible respect I think that was a misdirection. We are not here, of course, dealing with any case in which the board was not of a reasonable kind for a person in this position. He had been master of this very vessel for three years, and there is no suggestion of any change. But it is said the true test is not what during those three years, according to the implied contract between the parties, the reasonable style of board furnished would have cost the master, but what could Captain Dothie have himself provided his board for in a manner which would not have been unreasonable having regard to his position; and it is said that to that extent only ought any allowance to be made. I can see no justification for such a limitation. It seems to me that what you have to consider is not a case of extravagant luxuries furnished in a manner not reasonably necessary for the particular position, but we are dealing here with a recognized state of things which has been going on for three years, and I decline entirely to consider the question whether the captain could or could not have provided for himself adequately at a less cost than his employers provided for him. It was, I thought, at one time urged that when it was shewn that the total feeding of all the crew, including officers, amounted to 1*s.* 6½*d.* per day, that was all that ought to be allowed to the master of the ship. Put in that way, the proposition plainly would not bear investigation. I think it would have been a breach of contract on the part of the shipowners if they had simply given the master the same food as was supplied

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to the ordinary sailors on board their ship. I see no reason to doubt that as, in this case, the captain did his duty by the owners, so the shipowners did their duty by the master and sailors. The true test is not, therefore, what Captain Dothie actually saved by his allowance, but what was the actual value to the workman of the reasonable board which was provided for him by the shipowners.

It is impossible for us to do more than send it back to the learned county court judge to consider and ascertain what was the value of the food and the washing of the linen, having regard to the general direction which I have indicated as proper. It will be for the learned county court judge, applying his mind to that proposition, to say whether the items which will then have to come into calculation when added to the 216*l.* do or do not amount to a total exceeding 250*l.*

I think, therefore, the matter must go back to the learned county court judge to deal with that point. If he should come to the conclusion that the deceased was not a "workman" within the meaning of the Act, then, of course, the whole proceedings fall to the ground, and the applicants must pay the costs here and below.

If, however, he should come to the conclusion that, even applying what we consider a proper direction, the figure of 250*l.* is not reached, it will then be necessary for us to hear the argument on the further points on which we have only heard counsel for the appellants.

FLETCHER MOULTON L.J. I am of the same opinion. Under the Act no person not employed in manual labour is a "workman" within the meaning of the Act if he receives a remuneration exceeding 250*l.* a year. If he receives less than that, then he is entitled in cases of accident coming within the purview of the Act to compensation based on the remuneration which he was actually receiving. The same word is used in the Act in both cases, and in my opinion the Court is bound to give exactly the same meaning to the word "remuneration" when it is estimating compensation as when it is deciding whether a person is a "workman" within the meaning of the Act.

Now let us suppose that a workman is within the Act and claims compensation. He is in the receipt of certain monetary payments, but he is also in receipt of his food. Now it is incontestable that you must reckon the value of the food as part of the remuneration he gets. It is remuneration in the sense that it is something which he receives for his labour; it is remuneration in the sense that it is something the expense of which has to be borne by his master in order to procure that labour. But of course we cannot give compensation in food; we must turn it into money. Now how are we to turn it into money? The first thing that is evident is that it must in some way or other depend on what that food is. If a workman is entitled to or is, in his service, in receipt of good food, he is in receipt of higher remuneration than if the food were poor, and his master has to bear a greater expense in giving him that good food than if he gave him poorer food. So we must obviously look at the actual food which he is receiving as part of his remuneration. Then we must turn that into money. How are we to do that? Under ordinary circumstances we should have to consider the cost of that food. If we can get the actual cost, and can shew that it is bought under circumstances which justify our thinking that the price paid is not extravagant, that is a very easy way of getting at its value. It is quite possible, even in the case of food, however, that an element might come in akin to that which was present in *Great Northern Ry. Co.* v. *Dawson* (1), where the consideration of display came in, so that food costly beyond its value to the workman might for the master's purposes be given to him in the place of equally good food which would have cost much less, but which would have been of a different character. The Court would then have to consider what the value to the workman of equally good food would be, just as in the case of the uniform it calculated what was the value to the servant of an equally good coat. There is, however, nothing of that kind here; and one cannot help seeing that if any fair system of conversion of the food that this captain was actually receiving as part of his remuneration, any fair system of conversion of that into money be taken, the circumstances of the case raise a very grave doubt as to whether

(1) [1905] 1 K. B. 331.

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this individual was a "workman" at all; and, as the learned county court judge has in our opinion misdirected himself on this point in the way that has been clearly pointed out by the Master of the Rolls, this case must go back to him to decide that issue of fact, which lies at the root of his jurisdiction.

BUCKLEY L.J. The workman in this case was remunerated partly in cash and partly in kind. The question before us is how his remuneration is to be measured as to so much of it as was payable in kind. The learned county court judge directed himself that it was to be measured by what was saved to the workman. In my opinion that is erroneous; the question is not what the workman saved—that is to say, what he would have spent if he had not been in receipt of the allowance—but what he received by way of allowance. That requires, I agree, some qualification in this sense, that if a very luxurious allowance were made not really for the purposes of the workman, but for the benefit of the master, that would be a factor to be taken into consideration; but it is not a factor which arises in this case.

Here the workman was the master of a ship, and the remuneration payable in kind was his board on board the vessel. What we have to ascertain, I think, is the value of the board as in fact supplied to him, being, as it appears it was, reasonable according to the nature of his employment. The next question is how are we to ascertain that value, because the value to one person and the value to another person is often a different thing. I think that the value that we ought to arrive at is the value to the workman reasonably ascertained. It is not necessarily the cost to the employer, it is the value to the workman. But in the present case there is nothing to shew that the value to the workman was not at least equal to the cost to the employer—probably it was more, if there was any difference. The victuals for the ship were obtained in the gross for the supply of the whole ship, upon what I may call wholesale terms, and if the man had had to buy his own food in smaller quantities presumably he would have paid more. The facts seem to be that there was reasonable board, according to the nature of the employment, supplied at a cost which, so far as appears, was certainly not in excess of what would have been the

cost to the workman—probably less than that. In that state of things I think that the proper measure of value is at least the cost to the employer. The learned county court judge has not proceeded upon those principles at all, and, that being so, I think it must go back to him to ascertain, on going into the facts which bear upon that matter, what was upon those principles the figure to be attributed to the remuneration which was payable in kind.

Case remitted to county court.

Solicitors: *Robbins, Billing & Co.; Kearsey, Hawes & Wilkinson.*

G. A. S.

[IN THE COURT OF APPEAL.]

WESTERN *v.* KENSINGTON ASSESSMENT COMMITTEE.

London—Poor Rate—Valuation—Flats—"Houses or Buildings let out in Separate Tenements"—Rateable Value—Deductions from Gross Value—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *Sched. III.*

By s. 52 of the Valuation (Metropolis) Act, 1869, it is enacted that in calculating the rateable value of hereditaments for the purposes of the Act the percentage or rate of deductions to be made from the gross value is not to exceed the amounts in the Third Schedule to the Act.

The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list in the metropolis are to be divided, contains in a footnote a provision to the effect that the maximum rate of deductions prescribed therein shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and the general principles of law.

W. was the owner and occupier of a building in the metropolis consisting of two shops on the ground floor, a flat on the first floor extending over both the shops, and two similar flats on the second and third floors. Each shop consisted of one room with a yard and small offices in the rear, and a basement. Each flat consisted of a suite of rooms reached by a common staircase approached from the street by a passage at the side of one of the shops. Each flat had its own outer door opening on to the staircase. The passage way had a door opening on to the street. The two shops and three flats were five separate rateable hereditaments:—

Held, that the building was a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act, notwithstanding that the shops and flats were separate rateable hereditaments; and that therefore, in arriving at the rateable

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values of the shops and flats, the assessment committee might allow deductions from the gross values at a rate greater than the maximum rate of deductions specified in the Third Schedule.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Darling and Phillimore JJ.) upon a case stated by the Court of quarter sessions for the county of London. (1)

By s. 52 of the Valuation (Metropolis) Act, 1869, it is provided that the percentage or rate of deductions to be made from the gross value in calculating the rateable value of hereditaments for the purposes of the Act shall not exceed the amounts in the Third Schedule to the Act (2), so far as the same are applicable.

The Third Schedule to the Act (2), after specifying the maximum

(1) [1907] 2 K. B. 323.

(2) "THIRD SCHEDULE,

Shewing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided:—

	Maximum rate of deductions.
	Per cent. or proportion.
Class 1. Houses and buildings, or either of them, without land other than gardens where the gross value is under 20*l.* . . .	25 or $\frac{1}{4}$th.
,, 2. Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 20*l.* and under 40*l.*	20 or $\frac{1}{5}$th.
,, 3. Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 40*l.* or upwards	$16\frac{2}{3}$ or $\frac{1}{6}$th.
,, 4. Buildings without land which are not liable to inhabited house duty and are of a gross value of 20*l.* and under 40*l.* . .	20 or $\frac{1}{5}$th.
,, 5. Buildings without land, which are not liable to inhabited house duty, and are of a gross value of 40*l.* or upwards	$16\frac{2}{3}$ or $\frac{1}{6}$th.
,, 8. Mills and manufactories	$33\frac{1}{3}$ or $\frac{1}{3}$rd.
,, 9. Tithes, tithe commutation rent-charge, and other payments in lieu of tithe .	To be determined in each case according to the circumstances, and the general principles of law.
,, 10. Railways, canals, docks, tolls, waterworks, and gas works	
,, 11. Rateable hereditaments not included in any of the foregoing classes . . .	
The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11."	

rate of deductions in the case of various classes into which the hereditaments inserted in a valuation list under the Act are to be divided, contains in a footnote a provision to the effect that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and to the general principles of law.

The following are the material paragraphs of the case stated by quarter sessions :—

3. The appellant is the owner of two blocks or buildings numbered respectively 101 to 103 and 107 to 109, Ladbroke Grove, in the royal borough of Kensington, in the county of London.

4. The block numbered 101 to 103, Ladbroke Grove, consists of two shops on the ground floor, a flat on the first floor extending over both shops, and two similar flats on the second and third floors. Each shop consists of one room with yard and small offices in the rear and a basement. Each flat consists of a suite of rooms reached by a common staircase. The staircase is approached from the street by a passage at the side of one of the shops. Each flat has its own outer door opening on to the staircase. The passage way has a door opening on to the street. The block originally consisted of two private dwelling-houses, which have been converted as above. The two shops and three flats are five separate rateable hereditaments. The block and building numbered 107 to 109, Ladbroke Grove, is similar to the block numbered 101 to 103.

5. In May, 1905, the valuation committee for the borough of Kensington made and signed a new valuation list for the parish of Kensington. In that valuation list the said two blocks were mentioned as ten rateable hereditaments numbered 1134 to 1138 and 1140 to 1144 inclusive.

7. The appellant duly (1) made objection to the said valuation list, asking that the gross and rateable values might be altered, but not asking that the classes should be altered. The appellant

(1) See Valuation (Metropolis) Amendment Act, 1884 (47 & 48 Vict. c. 5), s. 2.

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duly appeared in support of his objection before the respondent assessment committee on September 14, 1905.

8. The respondents altered the gross and rateable values of some of the said hereditaments, and arrived at the rateable values by making deductions from the gross values in accordance with the maximum fixed by the Third Schedule to the Valuation (Metropolis) Act, 1869.

9. The appellant did not appeal from the decision of the respondents as far as regards the gross values of the said hereditaments, but duly appealed to the Court of quarter sessions against the decision of the respondents so far as regards the rateable values of the said hereditaments, and claimed that the total rateable values of the said ten hereditaments should be reduced from 355*l.*, the amount fixed by the respondents, to 288*l.*

10. It was admitted for the purposes of this case that the probable annual average cost of repairs, insurance, and other expenses necessary to maintain the said ten hereditaments in a state to command their rents was at least 140*l.*

11. If the deductions to be made from the respective gross values in order to ascertain the rateable values are determined by the rule mentioned in the footnote to the Third Schedule to the Act, then the respective rateable values of the said ten hereditaments ought to be the values claimed by the appellant.

12. The appellant contended:—

(1.) That each of the said two blocks or buildings let out in separate shops and flats was a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act;

(2.) That the maximum percentage or rate of deductions to be made from the gross value in calculating the rateable value under s. 52 and the second column of the Third Schedule of the said Act was not applicable to the said ten hereditaments, but the amount of deductions should be determined under the footnote to the Third Schedule according to the circumstances and the general principles of law.

13. The respondents contended:—

(1.) That the said two blocks or buildings let out in separate

shops and flats were not "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act;

(2.) That if the said hereditaments were within the footnote, the effect of the footnote was to take the said hereditaments out of classes 2 and 3 and place them in class 11, and that therefore the appellant had no right of appeal, because he did not object to the classes specified in the said list before the respondent assessment committee.

The Court of quarter sessions held that, in point of law, blocks or buildings let out in separate flats, as the blocks or buildings in question were let out, were not "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act, and, being further of opinion that in point of law the effect of the footnote was to transfer to classes 9, 10, and 11 the property referred to in the footnote, adjudicated and determined that, inasmuch as the appellant had not duly made objection before the assessment committee to the classes in which the said hereditaments had been respectively entered, an appeal did not lie to the Court of quarter sessions, and that, if such appeal did lie, the respondents had properly estimated the rateable values, and accordingly dismissed the appeal; but stated a case for the opinion of the King's Bench Division, in which case the foregoing facts were set out.

The questions for the opinion of the King's Bench Division were:—

(1.) Whether blocks or buildings let out in separate flats, such as the appellant's property, are "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869.

(2.) Whether the effect of the footnote is to take whatever property is therein referred to out of the class in which it would otherwise be, and to put it into one or other of the classes 9, 10, or 11.

(3.) Whether the appeal to the Court of quarter sessions failed because the appellant, in making objection to the said list before the assessment committee, did not object to the classes specified in such list.

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The Divisional Court (Lord Alverstone C.J., Darling and Phillimore JJ.) held that the building was a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869; and that, in arriving at the rateable values of the shops and flats, deductions from the gross values might be allowed at a rate greater than the maximum rate of deductions specified in the Third Schedule.

The assessment committee appealed.

Avory, K.C., and *Courthope Munroe*, for the assessment committee. The main question in the case is as to the proper deductions to be made in the valuation list from the gross value, that is, the estimated rental, of flats, and it is important to remember the nature and object of the valuation list. Sects. 51 and 52 of the Valuation (Metropolis) Act, 1869, lay down rules for the formation of the list; by s. 51 the overseers are to enter every hereditament in the valuation list in accordance with the classes mentioned in the Third Schedule to the Act, so that the deductions to be made in ascertaining the rateable value may be calculated in accordance with that schedule; by s. 52 the percentage of deductions is not to exceed the amounts in the Third Schedule so far as they are applicable; the schedule shews the various classes into which the hereditaments in the valuation list are to be divided. Each hereditament inserted in the list is a separately rated hereditament, and the expression "houses and buildings" in the Third Schedule must mean the houses and buildings inserted in the valuation list as separate rateable hereditaments. The decision in *Reg.* v. *St. George's Union* (1) shews that in a structure such as the present each flat is a separate rateable hereditament, and that is found as a fact in the special case. Each of these flats is therefore properly entered as a separate rateable hereditament in the valuation list, and each flat is a house within the meaning of the Third Schedule. In applying the schedule each flat will come separately within class 2 or class 3 as a separate rateable hereditament, and the maximum rate of deductions applicable to the class within which

(1) (1871) L. R. 7 Q. B. 90.

it falls will apply. Then the question arises whether the footnote to the schedule applies in such cases so as to allow of a larger deduction than the maximum deduction applicable to the particular class. The word "house" must have the same meaning in the footnote as in the body of the schedule, and the footnote can only apply to a separate rateable hereditament let out in separate tenements; it cannot, therefore, apply to a flat unless it is so let out, which is not the case here, and must be of very rare occurrence. The building or structure as a whole cannot be looked at as being the rateable entity, for the building as a whole is not inserted in the valuation list as a separate rateable hereditament. No doubt, if the building as a whole is to be considered, it would be within the footnote; but it would be wrong to insert it as a whole in the valuation list. The footnote only applies where the whole building is rated as one hereditament and is so inserted in the valuation list; it would apply, and was no doubt intended to apply, to a house let out in lodgings, where the proper allowances for repairs would probably be higher than the maximum allowances mentioned in the schedule. [They also cited *Grant* v. *Langston* (1); *Yorkshire Insurance Co.* v. *Clayton*. (2)]

Further, the notice of objection before the assessment committee was insufficient, as not specifying the correction which the objector desired to be made in the valuation list. It was an objection only to the rateable values appearing in the valuation list, which were reduced; there was no objection on the ground that the objector was entitled to the benefit of the footnote. Before quarter sessions the ground of objection argued was that the premises came within the footnote, but that objection should have been taken before the assessment committee, for an appeal to quarter sessions only lies where the appellant is aggrieved by the decision of the assessment committee on an objection taken before them. [They cited on this point *Reg.* v. *Justices of London*. (3)]

Ryde (*F. Giles* with him), for Western. The substantial question on this appeal is whether the footnote to the Third

(1) [1900] A. C. 383. (2) (1881) 8 Q. B. D. 421.
(3) [1897] 1 Q. B. 433.

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Schedule has any application; if it applies, the ratepayer is entitled to larger deductions from the gross values than the maximum deductions mentioned in the schedule. The words "houses and buildings" in the schedule and footnote are not used in a precise and scientific, but in a colloquial, sense; they are descriptive, and not technical, terms. As used in the footnote, the expression "houses or buildings" does not mean houses or buildings which are separate rateable hereditaments; that would be a forced and unnatural construction of the words.

[VAUGHAN WILLIAMS L.J. May not the rule be meant to apply only where the house as an entirety is in the occupation of one person who receives all the rents?]

The expression "separate tenement" is most appropriate to a structure let out in portions which are separately occupied and separately rated. In such cases as the present the rate is made on the occupier, but the owner pays under his covenant. In considering the actual amount of deductions to be allowed, no doubt each flat should be looked at separately, and the deductions should be fixed according to the circumstances of each flat. A consideration of the provisions of the Franchise Acts shews that the expression "separate tenements" cannot have been intended to apply to lodgings. A "separate tenement" as that expression is used in the footnote means a thing which is capable of being separately rated and in fact is so, and is something distinct from lodgings, which are not separately rated. In the case of lodgings there would be no special expenses for which extra deductions should be made in arriving at the rateable value, but in the case of flats the common staircase, which is practically part of the street, requires special expenditure on its repair, lighting, watching, &c., in order that the building as a whole may be maintained in a state to command a proper rent. [He referred to *Pullen* v. *St. Saviour's Union*. (1)]

As to what may be called the preliminary objection to this appeal, it is not raised by the special case and was not taken at quarter sessions, where the whole argument went upon the applicability of the footnote.

Avory, K.C., in reply.

(1) [1900] 1 Q. B. 138.

EARL OF HALSBURY. In my opinion this appeal should be dismissed. I desire to preface the few remarks which I have to make by saying that I decline to consider myself bound to answer questions which are inappropriate to the circumstances of the case, so far as we know them. I have no objection to answer questions which are appropriate to the real question of law underlying the dispute between the parties, and I think that the first question should be answered in the affirmative; in other words, I am of opinion that blocks or buildings such as those in the present case are houses or buildings let out in separate tenements within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869.

The other questions, which seem to be appropriate only to a different condition of things, it is difficult to answer in terms. The second question is, "Whether the effect of the footnote is to take whatever property is therein referred to out of the class in which it would otherwise be, and to put it into one or other of the classes 9, 10, or 11." That question is not appropriately expressed; but all that the footnote says is that the houses or buildings to which it applies are to be rated as though they were in classes 9, 10, or 11; and that question is one the answer to which is dependent on the particular facts of each case. I protest against its being supposed that I am giving an opinion as to the propriety of taking, in a block of buildings capable of being rated, each room in the block and then applying the footnote to it; in my opinion the footnote does not apply to such a case. As a matter of history, the mode in which this enactment came to pass is quite intelligible. At the time when the statute was enacted the system of building big houses divided into separate flats was growing, and those who devised the scales of maximum deductions were struck by the plain fact that the circumstances might vary to such an extent that the general description applicable to the buildings in the schedule might be inappropriate to such buildings as we are considering. To get rid of the difficulty the Legislature said that the maximum deductions were not to apply in such cases, because, the circumstances being peculiar, they might require special treatment; they were therefore left to the ordinary operation of the law, and the

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statutory maxima were made inapplicable to them. So far the matter is clear enough. But could any one suppose that it was intended to rate separately the different rooms in these large buildings, and then to apply the footnote to them? I think not. In my view the idea of the Legislature was that the building as a whole should be rated, and that the occupier of the whole was the owner, whether his ownership was freehold or leasehold, or of whatever nature it might be. The mode in which the assessable value was to be ascertained was by taking the thing in its condition at the time and making the proper deductions applicable to the whole house; in such cases the maximum deductions under the statute might prove to be inapplicable. If that is not the view to be taken, to what can the footnote be applied? It seems absurd to say that it is applicable to the case of one room in a big house. My answer to the first question is therefore, as I have already said, in the affirmative. As to the third question, which raises what has been called the preliminary objection, although the question was not raised in terms before the assessment committee, it is manifest that the question there argued was within the purview of the objection actually made; there is therefore nothing in this point. The appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I wish to say nothing which would involve travelling beyond the actual questions submitted to us by quarter sessions in the special case. As to the question of the application of the footnote, it depends, in my opinion, upon the occupation of the house, and there is not sufficient information in the case to enable us to say what the occupation really was.

BIGHAM J. I am of the same opinion. The language of the footnote is, in my opinion, very plain; it says that "the maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11." No one could say that the blocks of buildings in this case do not come within that description; and if they do, the

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question is, Are the overseers right in applying the maximum rate of deductions? In my judgment they are applying it without having regard to the circumstances of each case. They are arriving at the maximum deduction in respect of the whole building by having regard to the maximum deduction in respect of each flat, and in doing so they are, in my judgment, violating the spirit of the statute. As to the question whether this building ought to be rated as one single building, or whether each flat ought to be rated separately, I express no opinion.

Appeal dismissed.

Solicitors for Western: *Western & Sons.*

Solicitors for the assessment committee: *Pontifex, Hewitt & Pitt.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Copyright—"Dramatic Piece"—Accessories of Piece as performed—Scenic Effects—Stage Business—Matter incapable of being printed and published—Infringement—Dramatic Copyright Act, 1833 (3 & 4 *Will.* 4, *c.* 15), *s.* 1—*Copyright Act*, 1842 (5 & 6 *Vict. c.* 45).

The Acts relating to dramatic copyright contemplate, as the subject of protection under them, something which can be printed and published. Therefore, where a dramatic piece in which there is copyright is, as regards the verbal composition, in substance entirely different from another dramatic piece alleged to constitute an infringement of that copyright, the mere fact that accessorial matters, such as scenic effects, make-up of actors, or stage "business," in the latter piece, as performed, are similar to those employed in the performance of the former will not constitute an infringement of the copyright therein, such matters, taken by themselves, not being the subject of protection under the Acts relating to dramatic copyright, though in cases where the verbal composition of the pieces is more or less similar such matters may be regarded as throwing light on the question whether there has been an infringement.

Discussion as to what constitutes authorship of a piece.

APPEAL from the judgment of Phillimore J. in an action tried by him without a jury.

The action was brought for an injunction and damages, in

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respect of an alleged infringement by the defendant of the plaintiff's copyright in a "dramatic piece," the title of which was "Motoring or the Motorist."

The alleged infringement consisted in the representation by the defendant of a dramatic piece called "Astronomy."

Each of the pieces, which were termed "dramatic sketches" and were of a very slight character, intended for performance in music-halls, consisted of a dialogue between persons, accompanied by comic "business," in the one case taking place round a motor car, and in the other in connection with a telescope. In the opinion of the Court of Appeal the dialogue and story, if such it could be called, of the defendant's piece were in substance wholly different from those of the plaintiff's, but in respect of certain accessory matters there was a considerable similarity between the pieces. In each piece the number of the dramatis personæ was the same, namely, six, and some of the characters were similar—for instance, in each piece there was a boy, supposed to be an Eton boy, a tramp, a knock-kneed street urchin, an athlete, and a policeman. The plaintiff and the defendant themselves performed the principal part in their respective pieces, and the defendant imitated the plaintiff's make-up and style of acting. There was also a considerable degree of family likeness as regards the comic "business" in the two pieces—for instance, in both pieces one of the effects consisted in a cracker being placed by the street urchin under and exploded by the foot of one of the characters. It was also alleged that expressions were introduced into the defendant's piece by way of "gag" which had been taken from similar "gag" in the plaintiff's piece as performed.

It appeared that the plaintiff had not himself composed the dialogue of "Motoring or the Motorist," but had suggested the general idea and dramatic situations of the piece to a man named Pink, who had composed the dialogue in accordance with the plaintiff's suggestions, and who, in giving evidence, described his part in the matter as clothing the skeleton with words.

Phillimore J. found that there had been an infringement of the plaintiff's copyright in "Motoring or the Motorist," and granted an injunction restraining the defendant from representing "Astronomy" so as to infringe the plaintiff's copyright.

Hohler, K.C., and *G. A. Scott*, for the defendant. The plaintiff's piece is not within the scope of the Dramatic Copyright Act, 1833, or of the provisions of the Copyright Act, 1842, relating to dramatic productions. What those Acts contemplate by the term "dramatic piece," as a subject of protection, is some production of an author which is capable of being printed and published, and of being registered; something ejusdem generis with a "tragedy, comedy, play," or one of the other things previously specified. There is no dramatic element in such a piece as the plaintiff's. It is really a mere piece of nonsensical pantomimic buffoonery round a motor car: *Fuller* v. *Blackpool Winter Gardens, &c., Co.* (1) Phillimore J. seems to have thought that, although the two pieces, as regards the literary composition, if it be possible to apply such a term to them, were wholly different, the defendant's piece might, on the strength of the similarity of the two performances in respect of certain accessory matters, be considered to be an infringement of the plaintiff's copyright. That is treating the accessories without the words as constituting the dramatic piece. But ordinary scenic effects, comic "business," and physical accessories of a performance, such as are the common features of the harlequinade in a pantomime, taken apart from the verbal composition of a piece, are not the subject of copyright. They are not matter which can be printed or published. They do not constitute a material portion of that which is the subject-matter of copyright within the meaning of the decisions: see *Chatterton* v. *Cave*. (2) Secondly, the plaintiff cannot be considered as the author of the piece within the meaning of the Acts relating to dramatic copyright. He really only suggested the subject, and Pink wrote the piece. The person who puts the idea into language is the author within the meaning of the Acts relating to dramatic copyright: *Shepherd* v. *Conquest* (3); *Levy* v. *Rutley* (4); *Eaton* v. *Lake*. (5)

McCall, K.C., and *R. W. Turner*, for the plaintiff. In pieces of the class to which these pieces belonged, the dialogue or story

(1) [1895] 2 Q. B. 429.
(2) (1875) L. R. 10 C. P. 572; (1876) 2 C. P. D. 42; (1878) 3 App. Cas. 483.
(3) (1856) 17 C. B. 427.
(4) (1871) L. R. 6 C. P. 523.
(5) (1888) 20 Q. B. D. 378.

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is not so much the essence of the piece as the comic "business" and the make-up of the actors; and one of such pieces may be a very effective plagiarism of another, although ostensibly, and as regards the words of the dialogue, it is different. The two pieces must be looked at for this purpose as entireties. There is no reason why such a piece should not be capable of protection under the Acts relating to dramatic copyright; and it is submitted that it is not necessary under those Acts that a thing should be capable of being printed and published in order that it may come within the protection given by them. Under the Copyright Act, 1842, s. 20, the title only of the piece may be registered, and upon such registration the person whose title is registered is entitled under s. 21 to protection for the piece as first represented. It is submitted that this protection covers not only the words of the piece, but the whole piece, including the dramatic action, the scenic effects, the make-up of the actors, and other accessories. The question, therefore, is whether the part taken, whether dialogue, dramatic situation, scenic effect, or other accessory to the dialogue, is a material portion of the piece in which, as a whole, there is copyright; see per Brett J., as reported in the *Law Times*, in *Chatterton* v. *Cave* (1), and per Lord Blackburn in the same case in the House of Lords. (2) The question as to the identity of the matter in the defendant's piece with that in the plaintiff's is a question of fact, and there was abundance of evidence to justify the learned judge's finding that the defendant's piece was an imitation of the plaintiff's and an infringement of the plaintiff's copyright.

It is submitted that the plaintiff must be considered to have been the author of the piece "Motoring or the Motorist" within the meaning of the Copyright Acts. He supplied the ideas and dramatic situations to embody which the dialogue was composed. [They also cited *Hatton* v. *Kean*. (3)]

Hohler, K.C., for the defendant, was not called upon to reply.

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of Phillimore J. in an action in which an injunction was claimed,

(1) L. R. 10 C. P. 572; 33 L. T. 255.

(2) 3 App. Cas. 483, at pp. 501, 503.

(3) (1859) 7 C. B. (N.S.) 268.

on the ground that the performance of a dramatic sketch called "Astronomy," which was being produced by the defendant, was an invasion of the rights of the plaintiff, as the author of a dramatic sketch called "Motoring or the Motorist."

Before proceeding to read the words of the Act relating to dramatic copyright, upon which the question before us depends, I wish, in the first instance, to mention a matter which has caused me considerable difficulty in this case. Whatever the Dramatic Copyright Act, 1833, may or may not have been passed to accomplish, it was undoubtedly passed for the benefit of the authors of dramatic productions; and therefore, before one can apply the Act, one must find out whether the plaintiff is the author of the dramatic piece which is the subject-matter of the action. I feel great difficulty with regard to that question as a matter of fact. I know that Phillimore J. has found that the plaintiff was the author, but, looking at the evidence, I have very grave doubts on the subject, and am very much inclined to think that Mr. Pink was the sole author of this piece. There is no such difficulty here, I think, as arose in *Hatton* v. *Kean*. (1) In that case there had been a production by the defendant Kean of one of Shakespeare's plays, namely, "Much Ado about Nothing," for the purposes of which the plaintiff had been employed to compose music, which formed part and parcel of the play as represented to the public by the defendant. In the case of the representation on the stage of a play of Shakespeare, the spoken words are generally not the very words to be found in the most approved editions of the poet's works. The play as there printed requires for the purposes of representation a good deal of adaptation and arrangement of the stage situations, and a manager may often introduce stage directions not to be found in the original play. In that case the question was whether the music composed by the plaintiff could be treated as an independent composition for the purposes of copyright, or must be regarded merely as part of the play which as a whole was produced by the defendant; and that question was decided in favour of the defendant. Here there does not appear to me upon the evidence to be any

(1) 7 C. B. (N.S.) 268.

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such question as that which arises where each of two persons has composed part of a piece which is a unity. It is true in this case that, to a certain extent, the plaintiff suggested to Mr. Pink the general ideas on which the sketch was to be framed. But that does not, in my opinion, make the plaintiff the author of the sketch, either alone or jointly with Mr. Pink. Many things occur and are reported in the daily newspapers which might form the subject-matter of such a dramatic sketch as is here in question; for instance, such a sketch might conceivably be based upon the adventures of the suffragettes. But a music-hall artist who suggested such a topic as the subject of a sketch to another person, who composed a sketch upon it, would not, I think, be the author of the sketch. As at present advised, if it were necessary to determine the point, I should say that there was no ground for saying that the plaintiff was the author of the sketch in respect of which this action is brought.

Having stated the doubt which I feel as to the authorship of this piece, I now come to the provisions of the Dramatic Copyright Act, 1833, s. 1. The preamble runs as follows: "Whereas by an Act passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intituled 'An Act to amend the several Acts for the Encouragement of Learning, by securing the copies and copyright of printed Books to the Authors of such Books, or their assigns,' it was, amongst other things, provided and enacted, that, from and after the passing of the said Act, the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be living at the end of that period, for the residue of his natural life: and whereas it is expedient to extend the provisions of the said Act." I observe, in passing, that the Act thus referred to by the preamble to the section is one which deals with books, and matters which go to the making of books—that is to say, with compositions which are expressed in words, and which can be printed and published; and it is the provisions of such an Act

which it is proposed to extend. (1) Then the Act proceeds, by way of extending the Act so referred to, to enact that "from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof." I stop for a moment to point out that there again the subject-matter with which this Act appears to be dealing is a composition which, though not theretofore printed and published, is capable of being printed and published. Then it is provided that "the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same, and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent, or cause to be represented, at any place or places of dramatic

(1) "It is clear that the Legislature intended to afford the protection already given to copyright in books, to the authors and owners of dramatic productions": per Lord Hatherley in *Chatterton* v. *Cave*, 3 App. Ca. at p. 497.

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entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof, or his assignee, shall, previously to the passing of this Act, have given his consent to or authorized such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority." All through the section what is contemplated appears to be something which is capable of being printed and published. I should speak of this as being the true construction of the section with considerable confidence, but for the expressions stated to have been made use of by Brett J. in the report in the *Law Times* of the case of *Chatterton* v. *Cave* (1) in the Court of Common Pleas. In that case the question was whether there had been an infringement of the plaintiffs' copyright in a drama called "The Wandering Jew," which was an adaptation of a French drama, which itself was based upon a French novel. The action was tried by Lord Coleridge C.J., who found that two scenes or points of the drama of the defendant, also called "The Wandering Jew," had been taken from the plaintiffs' drama, without recourse to either the French novel or the French drama, originals common to the dramas of both plaintiffs and defendant. He found this in respect of the final scene of the defendant's drama and of the appearance of the Wandering Jew, and the stage business connected with that appearance, to be found in the second scene of the second act of the defendant's drama and the fourth scene of the first act of the plaintiffs' drama. He found that the drama of the defendant was not, except in these respects, a copy from, or colourable imitation of, the drama of the plaintiffs. In the Court in banc Brett J. is reported in the *Law Times* as saying: "Now it was first said that the subject-matter of the action was not the subject of copyright—that the Act gives a property in words, but not in situations and scenic effects, but I think that these latter are more peculiarly the subject of copyright than words themselves." That is a different view from that which I have been expressing as to the meaning of the Act. In the report of the case in L. R. 10 C. P. 572 the words which I have cited from the *Law Times* do not appear. It looks very much as if the learned

(1) L. R. 10 C. P. 572; 33 L. T. 255.

judge, having uttered those words, possibly without much time for consideration of the matter, may, when he came to revise his judgment, have come to the conclusion that perhaps what he had said on the subject was somewhat rash and have excised the passage. I do not find anything which, either in form or substance, is similar to that passage in the other judgments; on the contrary, it appears to me, on looking at the judgments of the other judges, and particularly that of Grove J., that the reasons which they gave were quite different from anything contained in that passage. But, be that as it may, what was there said does not bind us here, and the conclusion to which I have come is that the subject-matter in respect of which the author is to have the rights given by the Dramatic Copyright Act, 1833, is something which is capable of being printed and published.

In my opinion the matters which Phillimore J. treated as being the property of the author of a piece, which constituted subject-matter for protection under the Act, are not covered by the Act at all. In some parts of his judgment, however, he puts the matter in a somewhat different way, and appears to treat the subject-matter of the Act as being the verbal composition of the author plus matters such as the general get up of the characters, scenic effects and such like, which he speaks of as accessory or ancillary to the words of the piece. If the whole of his judgment had proceeded on that footing, I should have been of opinion that in substance he had dealt with the matter on the proper basis, although I should not have agreed with his conclusion. If one has to deal with words constituting a dramatic piece which are capable of protection under the Act, and the question is whether the copyright in those words has been infringed, I do not think that one has merely to take the two sets of words in the two pieces respectively and compare them side by side. I think that one ought to take the words of the first piece as presented to the public plus all their dramatic surroundings, and compare them with the words of the other piece, which is said to be a piracy, not taking the latter words by themselves only, but with the stage situations and scenic effects by which they were accompanied, and to ask oneself, taking the whole of each piece together, whether there is such a

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similarity between the plaintiff's play as a whole and the defendant's play as a whole that the latter is an infringement of the proprietary right of representation vested in the plaintiff. But as I have said, my view of the true construction of the Act is that the subject-matter, the right of the author in which is intended to be thereby protected, is something which is capable of being printed and published.

I do not know that I need go through the similarities and dissimilarities of the two sketches in question. So far as the words of the two are concerned, it is not denied that the similarities are of the most trifling description. Whatever else may or may not have been decided in *Chatterton* v. *Cave* (1), it appears clearly to be an authority for the proposition stated in the head-note to the report of the case in the Common Pleas, namely, that "to constitute an infringement of dramatic copyright under 3 & 4 Wm. 4, c. 15, s. 2, a material and substantial part of the plaintiff's dramatic production must be pirated; though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is infringed, if such part is of a very unessential nature, or very unimportant and trifling in relation to the effect of the whole composition." The similarities principally relied upon by the plaintiff's counsel are in respect of matters which in my opinion are really no part of the plaintiff's dramatic production. All that we have here is a certain similarity of stage situations and scenic effects, which ought not, in my opinion, to be taken into consideration at all in a case where there is no appreciable similarity between the words of the two productions. I understand that my brother Farwell proposes to refer to the statute 5 & 6 Vict. c. 45 as bearing on this case, and, as my judgment has already reached such a length, I will leave the discussion of its provisions to him. For the reasons which I have given I think that the appeal should be allowed.

FARWELL L.J. I am of the same opinion. I agree with the Lord Justice in thinking that Pink was probably the author of the piece in respect of which the action is brought, but I will

(1) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

not rest my judgment on that point. With great respect for the learned judge who tried this case, he seems to have confused the considerations proper to a "passing-off" case with those that govern a copyright case, which latter must depend on the terms of the Acts relating to copyright. Those Acts have received consideration in many cases, and it has been pointed out by Lord Esher M.R., in *Fuller* v. *Blackpool Winter Gardens, &c., Co.* (1), that the expression "dramatic piece" in the Dramatic Copyright Act, 1833, must be construed as meaning something ejusdem generis with the things described by the previous words, "tragedy, comedy, play, opera, farce." The preamble of the Act declares the object of it as being to extend the provisions of "an Act to amend the several Acts for the encouragement of learning by securing the copies and copyright of printed books to the authors of such books or their assigns." Sect. 1 of the Act is divided into two parts, the first of which deals with a case which could not arise in relation to a printed book, because, unlike such a book, a play may be produced before it is printed or published. Provision is therefore first made for that case, and for the period before a piece is printed or published; and then the section proceeds in the second place to deal with the case in which the piece has been printed and published, and with the rights of the author after such printing and publication. When that Act was passed production of a dramatic piece was not equivalent to publication of it for the purposes of the Act; but the amending Act, 5 & 6 Vict. c. 45, by s. 20 makes the first public representation or performance of any dramatic piece or musical composition equivalent, in the construction of the Act, to the first publication of any book, and by s. 21 all the remedies provided by the Dramatic Copyright Act, 1833, are given to the person who may have at any time the sole liberty of representing such dramatic piece or musical composition as fully as if the same were re-enacted in the later Act. The result is that, whereas the first portion of s. 1 of the Act of 1833, which dealt with a dramatic piece before printing and publication, assigned no express limit to the period during which the protection given was to last, the combined effect of the two Acts, which are to be read as one, is that protection is only given to the author for

(1) [1895] 2 Q. B. 429, at p. 433.

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a certain period of time from the first publication, i.e., the first representation of the piece; so that the whole legislation hangs together, and it is clear that the only things which are protected by it are things which are capable of being printed and published. It follows, therefore, that scenic effects, taken by themselves, and apart from the words and incidents of the piece, are not the subject of copyright, because they cannot be the subject of printing and publication. I am far, however, from saying that, in dealing with the question of infringement of copyright in the case of two pieces, the words of which are more or less alike, similarity of scenic effects and the make-up of the actors, and such like matters, may not be regarded, though not by themselves subjects of protection under the Act, as being evidence of an animus furandi on the part of the defendant; which, though it is not a necessary element in such cases, may have an important bearing on the view taken by a Court on the question whether the defendant has been guilty of plagiarism and has thereby infringed the rights of the plaintiff. Nor do I say that scenic effects may not be protected as part and parcel of the drama: scenes do of course form parts of drama, and it is the dramatic piece as a whole that is protected by the Act. It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is within it: see *Fuller* v. *Blackpool Winter Gardens, &c., Co.* (1) The scene can only be protected as part of a whole which is within the Act, and as such carries the statutory protection to its accessories. In order to obtain protection there must be matter capable of being printed and published, and the plagiarist must copy a material part thereof. "Gag" cannot be within the Act; if it were, its author would be the actor, not the writer of the piece; nor would it make any difference if the actor and writer were one and the same person, for the Act does not extend to verbal alterations and additions which vary from week to week, and possibly from night to night, in order to keep up with the events of the day. The Act creates a monopoly, and in such a case there must be certainty in the

(1) [1895] 2 Q. B. 429.

subject-matter of such monopoly in order to avoid injustice to the rest of the world. It seems to me that the view which we are taking in this case is really the same as that expressed by Grove J. in *Chatterton* v. *Cave* (1), when he said: "The whole of the language of the defendant's drama being different from the plaintiffs', and the two versions being substantially independent, can it be said because in the last scene an expedient is adopted which is identical with that adopted by the plaintiffs' drama, but which may be said to be 'common form' in all such plays, there is an infringement of copyright? I think this would be going too far. The intention is to protect original merit; it would be descending to absurdity to give protection to the application of a commonplace expedient of scenic art to the end of a version of a drama." I think that language really expresses the result of the facts in the present case. The two pieces here, upon being read, appear to be so materially different that the defendant's piece cannot be said to be a plagiarism of the plaintiff's. The claim is not really in respect of copyright in the written words, but in respect of matters such as "gag" and "stage business," which cannot be brought within the scope of the Copyright Acts. We are in as good a position as the learned judge below for the purpose of forming a judgment whether one of these documents is a plagiarism from the other. They appear to differ so much, making due allowance for the strong family likeness which exists between sketches of this kind, that no foundation is laid for entering upon the question how far the use of similar scenic effects and such like matters may assist in establishing the conclusion that there has been an infringement of copyright.

KENNEDY L.J. I am of the same opinion. If I had to decide the question who was the author of the piece in which the plaintiff claims the copyright, I should be disposed, as at present advised, to say that, upon the facts proved, Pink was the author, but I do not propose to base my judgment on that point. With regard to the other point, I can put into a few sentences all that I wish to add. With all respect to the learned judge who tried this case, I think he has committed himself to a view

(1) L. R. 10 C. P. 572, at p. 579.

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which appears to me, for the reasons which have already been given by my brother Farwell, to be an unsound one. The view which he took seems to involve that a "dramatic piece" may exist, for the purposes of the Dramatic Copyright Act, without any words at all. I cannot agree with this view. I am not prepared to hold that, for the purposes of that Act, a "dramatic piece" can exist without words. Starting to consider the facts of the case on the basis of the view which he took of the law, I think that the learned judge, so to speak, viewed those facts through the wrong spectacles for the purpose of determining whether there had been an infringement by the defendant of the plaintiff's copyright. He treated the make-up and gestures of particular actors and such things as being matters which, quite apart from the words, might constitute the subject of infringement, because they had occurred in the representation of the plaintiff's piece. That does not appear to me to be right. I think that the Dramatic Copyright Act was passed with the object of protecting the literary productions of dramatic authors; though I do not say that, for the purpose of judging whether one dramatic piece is a plagiarism from another, where words of pieces deal with more or less similar subject-matters, it is not legitimate to look at dramatic situations and scenic effects, in order to see whether, taking them in conjunction with the words, they do not help to shew that there has been a borrowing of an idea or of an expression of an idea from another piece. I think that the meaning of what was said by Lord Blackburn in the House of Lords in *Chatterton* v. *Cave* (1), when he said in effect that a jury might properly be directed that they might consider such things, is not that they could by themselves form an infringement, but that they might be considered as some evidence of the substantial identity of the two productions. I cannot help thinking that the references in the judgment of the learned judge in the Court below to the manner in which the defendant was dressed, and the facial contortions which he used, as being similar to those which were characteristic of the plaintiff as an actor, were not directly relevant. The question is whether an expression of a thought or design has been made the subject

(1) 3 App. Cas. 483, at p. 503.

of plagiarism. They are merely attempts to raise a laugh by an imitation of another actor who is known to the public. I agree that the appeal should be allowed.

Appeal allowed.

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Solicitors for plaintiff: *Burton, Yeates & Hart, for Tyrer, Kenion, Tyrer & Simpson, Liverpool.*

Solicitors for defendant: *Amery Parkes, Macklin & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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NORTH MANCHESTER OVERSEERS *v.* WINSTANLEY.

Rates—Burial Ground separated from Church—Churchyard—Liability to Poor Rate—Profit derived from Burial Ground—Exemption from Poor Rate—Premises "exclusively appropriated to Public Religious Worship"—Poor Rate Exemption Act, 1833 (3 & 4 *Will.* 4, *c.* 30).

The churchyard of a parish church having been closed by virtue of an order made under the Acts relating to overcrowded burial grounds, two pieces of land contiguous to each other, but at a distance of 300 yards from the church, were acquired by the Ecclesiastical Commissioners or their predecessors under the Church Building Acts, and were consecrated for interment according to the rites of the Church of England, and thereafter constituted the burial ground used in connection with the church. There was a fixed fee for the performance of burials, and charges were made for the purchase of so-called "freehold graves" in the burial ground, for the reopening of graves, for taking down and fixing memorials, and for other matters connected with interments; and the net income derived therefrom was received by the rector of the parish, and retained by him for his own use. There were no buildings in the burial ground for the purpose of conducting religious services in connection with burials:—

Held (reversing the decision of a Divisional Court, [1907] 1 K. B. 27), that there was a rateable occupation by the rector of the burial ground, and that it was not exempt from rateability by virtue of the Poor Rate Exemption Act, 1833.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Ridley J. and Darling J.) (1) upon a case stated by the Recorder of Manchester on an appeal against a poor rate.

The rate had been made upon the respondent, the rector of

(1) [1907] 1 K. B. 27.

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All Saints' Church, in the township of North Manchester (1), in respect of the occupation of certain land appropriated as a burial ground for his parish as stated in the case.

The facts as stated by the case are fully set out in the report of the case in the Court below (2), and are sufficiently stated in the head-note and judgments for the purposes of this report.

The recorder held that the burial ground was exempt from rateability under the Poor Rate Exemption Act, 1833, and therefore allowed the appeal against the rate.

The Divisional Court, affirming the decision of the recorder, but on a different ground, held that there was no rateable occupation of such a burial ground by the rector of the parish.

Dec. 7. *E. Sutton* and *Gordon Hewart*, for the appellants. Apart from any question of exemption, the respondent has a rateable occupation of the land in question. He has the freehold in, and the legal possession of, this burial ground; and he does in fact occupy it, and derives a profit from it. It is not really material for the purpose of rating to consider whether the profit so derived by him is legal or not. The rector, no doubt, cannot legally use the burial ground in a manner inconsistent with the purposes for which it was provided under the statutes in that behalf, namely, the purposes of a burial ground, but he is the legal occupier of it, and is entitled to make any use of it for his own benefit which is consistent with those purposes: *Greenslade* v. *Darby*. (3) It is submitted that, upon the facts of this case, it falls within the general principles laid down in *Jones* v. *Mersey Docks and Harbour Board* (4), and the respondent is liable to be rated as being the beneficial occupier of the land in question. Assuming that he was not entitled to sell the exclusive right of burial in particular graves, and therefore that the profit which he derives from doing so is illegally obtained, it is sufficient for rating purposes that he, being the legal occupier of the land,

(1) The rector was the appellant at quarter sessions. The term "respondent" has been used in the report of the case in the Court below with reference to his position in that Court. It has therefore been thought convenient to continue to use the word in the same sense in this report.

(2) [1907] 1 K. B. 27.

(3) (1868) L. R. 3 Q. B. 421.

(4) (1865) 11 H. L. C. 443.

does in fact derive the profit from it. It does not lie in the respondent's mouth to say, for the purpose of avoiding rateability, that the use to which the land was put by him was illegal: *Overseers of Putney* v. *London and South Western Ry. Co.* (1) The Divisional Court held that the burial ground here in question must be treated as standing on the same footing as an ordinary churchyard, and therefore the respondent was not rateable in respect of it, because it had never been held that the parson is the occupier of the churchyard so as to make him liable to the poor rate as a beneficial occupier. It has, no doubt, not been the practice to rate parsons in respect of their occupation of the churchyards attached to their churches; but, as a rule, there is so little profit, if any, attached to such occupation, that it cannot be inferred from the practice in this respect that, as a matter of law, the parson can never be liable to be rated as a beneficial occupier of the churchyard. But, however this may be, a burial ground separated from the church and churchyard cannot be said to be part of the churchyard: *The Oxford Poor Rate Case.* (2) This case does not come within the class of cases, such as *Lambeth Overseers* v. *London County Council* (3), in which, a hereditament being devoted entirely to the public benefit, there is really no beneficial occupation of it by the legal occupiers. [They also cited on this point *Reg.* v. *Abney Park Cemetery Co.* (4); *Reg.* v. *Inhabitants of St. Mary Abbot's, Kensington* (5); *Greig* v. *University of Edinburgh.* (6)]

Secondly, the burial ground in question was not exempt from rateability by virtue of the provisions of the Poor Rate Exemption Act, 1833, s. 1—first, because it cannot be said to have been "exclusively appropriated to public religious worship"; and, secondly, because it does not come within the words "churches, district churches, chapels, meeting houses, or premises" in the section, inasmuch as the word "premises" must there be construed as meaning something ejusdem generis with the hereditaments previously specified.

Macmorran, K.C., and *G. Rhodes*, for the respondent. The

(1) [1891] 1 Q. B. 440.
(2) (1857) 8 E. & B. 184.
(3) [1897] A. C. 625.
(4) (1873) L. R. 8 Q. B. 515.
(5) (1840) 12 A. & E. 824.
(6) (1868) L. R. 1 H. L. Sc. 348.

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respondent had not a rateable occupation of the burial ground, because such legal occupation as he had was not on his own behalf, but on behalf of the parishioners. The case therefore comes within the principle on which *Lambeth Overseers* v. *London County Council* (1) was decided. There is no authority on the subject directly in point, and therefore the Court can only proceed by analogy. In *Lambeth Overseers* v. *London County Council* (1) it was held that the London County Council, being only occupiers of Brockwell Park for the benefit of the public, although they made some profits from it by the issue of licences for the supply of refreshments, and for grazing rights and otherwise, were not occupiers of the park for rating purposes. The burial fees and the charges paid for the purchase of so-called "freehold" graves, and such like matters, cannot properly be regarded as profits derived from the occupation of the burial ground. The rector cannot grant any real interest in the soil of the burial ground: *Bryan* v. *Whistler*. (2) The charges are really only customary perquisites of the rector, and the reservation of the particular grave for the purchaser and his relations is merely a matter of customary arrangement, and not of legal right. This burial ground must be regarded as standing on the same footing as a churchyard. It cannot make any difference in point of principle that it is separated by a short distance from the church and old churchyard: *In re Bateman* (*Baroness*) *and Parker's Contract*. (3) By its consecration it became in effect part of the churchyard. Churchyards have never been treated as the subject of rateability. [They cited on this point *Wright* v. *Ingle* (4); *Robson* v. *Hyde* (5); *Hare* v. *Overseers of Putney*. (6)] The cases with regard to cemeteries established for profit, such as *Reg.* v. *Abney Park Cemetery Co.* (7), have no application to the present case.

Secondly, assuming that the character of the respondent's occupation was such as to render him liable to be rated apart from any exemption, it is submitted that the case falls within

(1) [1897] A. C. 625.
(2) (1828) 8 B. & C. 288.
(3) [1899] W. N. 30.
(4) (1885) 16 Q. B. D. 379.
(5) (1783) Cald. 310.
(6) (1881) 7 Q. B. D. 223.
(7) L. R. 8 Q. B. 515.

s. 1 of the Poor Rate Exemption Act, 1833. The churchyard is really an appendage of the church; it is part of the premises of the church, which is appropriated as a whole to public religious worship, and the Burial Service is as much religious worship as any other service of the church; and this burial ground stood in the same position as a churchyard. [They cited on this point *Plumstead Board of Works* v. *Ecclesiastical Commissioners for England*. (1)]

E. Sutton in reply.

Cur. adv. vult.

1908. Feb. 25. SIR GORELL BARNES, PRESIDENT. I am authorized by Lord Halsbury to say that he has read the judgments which are about to be delivered, and he expresses his concurrence in both of them.

The question stated in this special case for the opinion of the Court is whether the learned Recorder of Manchester, Sir Joseph F. Leese, was correct in holding that a certain burial ground or cemetery in the parish of All Saints, Newton Heath, Manchester, was exempt from rating under the provisions of the statute 3 & 4 Will. 4, c. 30.

The old churchyard of the aforesaid church had been closed by order in the year 1854, and in 1855 and 1883 two sites contiguous to each other were acquired under the Church Building Acts (58 Geo. 3, c. 45, s. 33, and 8 & 9 Vict. c. 70, s. 13), and now constitute the burial ground used in connection with the said church, although at a distance of 300 yards therefrom, and the freehold of these sites is vested under these Acts at present in the respondent (who is the rector and incumbent of All Saints' Church) "for the use of the inhabitants of the place for which such burial ground was acquired"—that is to say, the parish aforesaid.

It appears from the case that the fee for the performance of the burials in the said burial ground is established and fixed under the Parish of Manchester Division Act, 1850, as 2*s.* for each burial, and that in the year 1886 the then rector of the said parish and others, being parishioners, issued to

(1) [1891] 2 Q. B. 361.

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the public a statement of the scale of charges for what is called therein the purchase of freehold graves in the said burial ground and of rules and regulations for the care and management thereof. A copy of this statement was annexed to the case, and it contains also other charges, for reopening graves, for taking down and refixing memorials, for planting and other work connected with graves and vaults and the performance of burials. At the date of the laying of the rate in question the like scale of charges was made by the respondent in respect of interments in the said ground, and in addition thereto a further charge was made to meet the proportion of poor rate payable in respect of the burial ground. The gross receipts received by the respondent from the purchase of graves in the said burial ground and other charges connected with the interment of the dead, including the fees of the respondent, the clerk, and the sexton, for the performance of burials there, for the year next preceding the date of the laying of the said rate, amounted to the sum of 210*l.* 16*s.*, whilst the expenses of the maintenance of the burial ground and for wages, repairs, and other outgoings connected with the same amounted to the sum of 110*l.* 8*s.* 10*d.*, leaving a net profit to the respondent of 100*l.* 7*s.* 2*d.* This profit appears to have been arrived at after paying to the rector for taking the services and to the clerk for his services the fees for the performance of the services. This profit has been received and retained by the respondent to his own use. From that sum the appellants deducted one-sixth, and so arrived at the rateable value of 83*l.* 10*s.*, as entered in the rate appealed against.

The recorder held that the ground was exempt from rating under the provisions of the said statute of William IV., and allowed, with costs, the respondent's appeal against the poor rate which had been made upon him as occupier thereof, subject to a case for the opinion of the Court.

The case was heard before a Divisional Court of the King's Bench Division, and the decision of the recorder was affirmed, but not on the ground taken by him. Ridley J., who delivered the judgment of the Court, expressed the doubt which the Court felt as to whether the last-mentioned statute exempted the burial ground from rating, and the case was decided in the respondent's

favour on another ground, namely, that the respondent's position in relation to this burial ground was similar to that which he held with regard to the parish churchyard, and that it had never been held that the incumbent was in occupation of a churchyard so as to make him liable to poor rates as a beneficial occupier. Now, as I read the special case, the respondent was rated as "occupier" of the ground in question, and the case does not appear to me to have been stated to raise the question of occupation, the sole contention therein for the respondent being that the ground was exempted by the statute of William IV., and the question for the opinion of the Court was confined in the manner above stated. We were informed, however, that, on the argument before the Divisional Court, the point was raised by the respondent's counsel that the respondent was not in occupation of the burial ground, and that, in order to save the expense of having the case re-stated, counsel were allowed to argue this point on the materials before the Court. It would seem from the observation of the Lord Chief Justice (1) that at first the Court did not intend to decide the question whether the rector could not be an occupier, but ultimately, after reserving judgment, the Court came to the conclusion which I have already stated. This point was very fully argued on the appeal, and was the main point discussed, though the other point upon which the recorder decided the case was also argued.

The points for consideration are, no doubt, of considerable importance, because it appears from a statement in the case that similar charges are made in respect of graves in other churchyards in the district in which All Saints' Church is situate, and I have very little doubt that similar charges are made in numerous other places, and that a substantial part of the income of incumbents in many places is derived from such charges.

I propose to deal with the former point first. It is clear, I think, that the freehold of the ground is in the respondent, and that he is to be considered as in possession of the ground. It is probably correct to say that in these respects his position towards the ground is similar to that which a rector holds towards an ordinary churchyard. His position is very clearly stated by

(1) [1907] 1 K. B. 27, at p. 34.

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Lord Blackburn in the case of *Greenslade* v. *Darby* (1), where he says: "Originally the land was the property of some lay person, which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector, and he was entitled to the land, including the grass, herbage, and everything else, as fully as the original owner had been: but, as the land had been set apart by consecration for the church and churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration. Nevertheless, the enjoyment of the property, so far as it could be exercised by one holding a sacred office, belonged to the rector as owner of the freehold. Now, it was necessary for the preservation of the churchyard to remove trees in it which had been blown down, and also to cut, mow, and graze the herbage growing there; in each case there would be some profit to be made; but, notwithstanding the church was consecrated, the profit would belong to the rector as being owner of the freehold." Every parishioner has a right to be buried in the parish churchyard, and the inhabitants of the place for which the burial ground in question was acquired would appear to have the right to be buried there. At common law no burial fee is due, though there may be burial fees due by the custom of any particular parish. But, although there is this right of burial, the parishioner has no right of burial in any particular spot, and the practice of making such charges as those in question in respect of graves has no doubt grown up from the fact that arrangements have been made with the parson for burial in a particular spot, and for a reservation of that spot for the exclusive right of burial in it of the person interred or other members of the family.

We were not, however, asked to consider whether the respondent had any right to sell graves in the ground in question with exclusive right of burial there, nor whether he had any right to the fees taken for so doing. Counsel on both sides did not desire to argue these points, and probably considered that they were immaterial, if, as is in fact the case, the respondent has

(1) L. R. 3 Q. B. 421, at p. 429.

acted as if he had the right to such privilege, and has in fact received profits for so doing, though I cannot refrain from noticing the case of *Bryan* v. *Whistler* (1), from the judgments in which it would appear that the rector had no such rights to sell, and that for any parishioner to obtain such exclusive privilege a faculty would be required.

The argument for the respondent was that, although his position with regard to the churchyard was that which I have above indicated, he was not in occupation thereof within the meaning of the statute of Elizabeth, and that there was no trace throughout the books of any attempt to rate a parson in respect of an ordinary parish church or churchyard. In my opinion, however, it by no means follows, because it has never been held that a churchyard is in the occupation of a parson so as to make him liable to poor rates as beneficial occupier thereof, that it ought, when the question is raised, to be decided in his favour. It is true that in Phillimore's Ecclesiastical Law, 2nd ed. vol. 2, p. 1384, there is a passage which reads thus: "Nor is a church rateable, nor is the incumbent liable as owner or occupier for rates upon it"; but no authority is cited for this statement, unless it is based on 3 & 4 Will. 4, c. 30. There is no doubt that parish churches and churchyards have not been rated, but I think that the true ground on which this must be placed is that originally they have not been, speaking generally, the subject of profitable or beneficial occupation; in other words, they have not been worth rating, for, as every parishioner had a right to a seat in his parish church and a right to be buried in his parish churchyard, the opportunity of fees in former days for seating and for burials in specially reserved ground was not extensive, and probably not productive of more than enough to pay the expenses of maintenance. Possibly, if there were formerly cases in which profits were made by means of reserving graves for certain persons exclusively, the notions which to some extent prevailed as to the non-rateability of some public buildings may have affected any attempt to levy a poor rate in such cases, but these notions have been finally disposed of by the case of *Jones* v. *Mersey Docks and Harbour Board* (2); and it is now clear that

(1) 8 B. & C. 288. (2) 11 H. L. C. 443.

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it is only property which is in the occupation of the Crown which is exempt from rating under the statute of Elizabeth. I am not, of course, overlooking such cases as the *Putney Bridge Case* (1) and the *Brockwell Park Case* (2), decided on the ground that there was no one in exclusive occupation.

In later times, when population has increased and so-called sales of graves in parish churchyards have yielded a profit to the parson, I can see no reason why, if the attempt had been made, rateability in respect thereof should not have been decreed. The statute of Elizabeth (43 Eliz. c. 2), so far as it is necessary to state its terms for the present case, provided that the churchwardens and overseers should "raise, weekly or otherwise, (by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit) a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work; and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the same parish." It is as an "occupier" of the ground in question that the respondent was rated under the terms of the aforesaid statute. The term "occupier" was not used in that statute in a very strict sense, for it treats those who were in receipt of tithes impropriate, or propriations of tithes, as "occupiers" thereof, and rates have been made upon persons in receipt of the tithes as "occupiers" of the tithes.

The position of the respondent is that he has the freehold in the ground, the possession thereof, and the enjoyment of the property so far as it can be enjoyed in the circumstances, and by virtue of that position he, in fact, receives from it what appears to be a regular average income from the use of the ground in the manner described in the case, and no other person is in occupation thereof nor has any rights therein except the right which

(1) [1891] 1 Q. B. 440. (2) [1897] A. C. 625.

the parishioner has to be buried in the burial ground. In that state of things, having regard to the terms of the statute and the scope and object thereof, I think, notwithstanding the very able argument on the part of the respondent in this case, that he must be treated as having the occupation of the ground within the meaning of the statute.

The cases which were examined in the course of the judgment of the Divisional Court do not seem to me to be inconsistent with this view. The first case of *Robson* v. *Hyde* (1), in which Buller J. made the observations which are referred to in the judgment below, does not appear to be in point. The case of *Beswick* v. *Alker* (2) turned upon the construction of s. 24 of the Representation of the People Act, 1832; and so also did the case of *Wolfe* v. *Surrey County Council* (*Clerk of*) (3), in which Kennedy L.J., in giving judgment, stated that the Court did not think it necessary to express any opinion upon the point which had been suggested, that the occupation mentioned in the section —that is, s. 24 of the Act of 1832—must be taken to have been occupation of property in respect of which a person is liable to the payment of rates; but I agree that the cases of *Reg.* v. *Inhabitants of St. Mary Abbot's, Kensington* (4) and *Reg.* v. *Abney Park Cemetery Co.* (5) have not a direct bearing upon the present case, as they both turned upon the position of the cemetery companies therein mentioned under the statute and deed respectively relating thereto.

There is one point which, although it was not discussed on the appeal, is one upon which the following observations may not be out of place, as the question of the liability of a parson to be rated in respect of a parish burial ground might be raised in other cases and in another form. I have already noticed that the rate in question was made upon the respondent as "occupier" of the ground in question, and, if occupier, he would be rateable as such, but it may be observed that under the statute of Elizabeth the parson or vicar is also rateable to the poor as such. In *Rex* v. *Justices of Buckinghamshire* (6) Abbott C.J.

(1) Cald. 310.
(2) (1872) L. R. 8 C. P. 265.
(3) [1905] 1 K. B. 439.
(4) 12 A. & E. 824.
(5) L. R. 8 Q. B. 515.
(6) (1823) 1 B. & C. 485, at p. 487.

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said: "The 43 Eliz. c. 2 goes much farther than the Highway Acts; that makes all local visible property liable to be rated, and parsons and vicars are rateable under it eo nomine"; and Bayley J. said: "It does not follow that the parson is liable under the Highway Act because he is so under 43 Eliz. c. 2. Under the latter he is not liable as occupier; tithes, generally, are not mentioned in that Act, although tithes impropriate are. But a parson is rateable to the poor as such: *Rex* v. *Turner*." (1)

I have already set out the material words of the statute of Elizabeth, and it is to be noticed that the tithes therein mentioned are tithes impropriate and propriations of tithes, and the statute makes no special mention of tithes in the hands of the clergy as rateable property. Tithes impropriate and propriations of tithes, which are mentioned, mean respectively tithes in the hands of lay impropriators, or tithes propriate by spiritual corporations, such as bishops, monasteries, &c., to their own use, which were no doubt specially mentioned, as the owners might not be either inhabitants or occupiers in the ordinary sense of lands or houses in the parish. From earliest times it appears to have been the practice that the parson or vicar should be rated for his tithes. As far as I can follow the history of the matter, it would seem that, although he might have been in form rated as an occupier of tithes, the true ground of his rateability was because he was an inhabitant, and was to be rated on the same basis as an inhabitant. The liability of the inhabitant appears to have been settled in *Sir Anthony Earby's Case* (2), namely, that the assessment should be made according to the visible estate of the inhabitant in the parish both real and personal, and a very full history of the law relating to rating of inhabitants was given in the learned argument of Mr. Burrough in *Rex* v. *Churchwardens of Andover*. (3)

The Parochial Assessments Act (6 & 7 Will. 4, c. 96) may have been intended to alter the law upon the subject of rating personal property, but, as Lord Denman said in *Reg.* v. *Lumsdaine* (4): "The object of the Act does not appear to have been to introduce any new principle of rating, but to affirm that which

(1) (1718) 1 Str. 77.
(2) (1633) 2 Buls. 354.
(3) (1777) 2 Cowp. 550.
(4) (1839) 10 A. & E. 157, at p. 160.

had been already established by decisions of this Court." But the Act of 1840, 3 & 4 Vict. c. 89 (continued from time to time by the Expiring Laws Continuance Acts), after reciting the Act of Elizabeth and the Act of 13 & 14 Char. 2, c. 12, which extended the Act of Elizabeth, recited that by reason of the provisions of the said Acts it had been held that inhabitants of parishes, townships, and villages, as such inhabitants, were liable in respect of their ability derived from the profits of stock in trade and of other property to be taxed for and towards the relief of the poor, and enacted that from and after the passing of that Act it should "not be lawful for the overseers of any parish, township or village to tax any inhabitant thereof, as such inhabitant, in respect of his ability derived from the profits of stock in trade or any other property, for or towards the relief of the poor"; but the Act contained a proviso that nothing in the Act contained should "in anywise affect the liability of any parson or vicar or of any occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods to be taxed under the provisions of the said Acts for and towards the relief of the poor." The liability of the parson or vicar as such was left as it was before the last Act, and he would therefore appear to remain liable to be taxed for the relief of the poor as parson or vicar, and liable in respect of the tithes of which he is in receipt; and it would seem that he is also left liable in respect of such profits as he might make out of the visible property which is under his control in the parish. This point, as I have already noticed, was not discussed before the Court, and it may be that there are observations and arguments in connection with it which at present I do not appreciate; but, if such general liability as that already indicated rests upon him in addition to that which may be incurred by him as occupier of any lands, and if it were sought to rate him as parson or vicar, it is difficult to see why he should not be rated for that which amounts to a regular source of income derived from the so-called sale of graves which he is enabled to earn by his position with regard to the burial ground. I do not consider that this view is really inconsistent with that of the Court of Appeal in the case of *Reg.* v. *Christopherson* (1),

(1) (1885) 16 Q. B. D. 7.

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where the Court, while considering that the statute of 1840 left the liability of the parson or vicar precisely as it was before the passing of that Act, held that the rector in that case was not rateable to the poor rate in respect of a certain rate called the "rector's rate" made upon the owners of houses, shops, and warehouses, cellars, and outhouses in the parish of Falmouth; for, although at first sight it would seem from the judgment in that case that the Court excluded liability for rating to the poor rate in respect of the sums received by the rector for the said "rector's rate," apparently on the ground that the payment was not tithes, nor a payment in lieu of tithes, nor an oblation or offering of such, I do not find anything in these judgments or in any previous case which would place such a restriction upon the general words of the statute as would exclude the parson or vicar from being rated in such a case as that at present before the Court, where the money received is derived from the respondent's dealing with land in the parish, which is his freehold and under his control, in a manner from which he derives a substantial profit: see especially the judgment of Cotton L.J. at pp. 15 and 16 of the report in the *Law Reports;* and, although some limitation has always been placed upon the general words of the statute relating to taxing every inhabitant, parson, and vicar, an examination of the early history of the relief of the poor by the Church (Pashley on Pauperism and Poor Laws (1852), chapter 4) and of the legislation which led up to the passing of the statute of Elizabeth (ibid. chapters 5 and 6) leads me to consider that upon the true construction of the Act the respondent would be rateable as rector in respect of such property as that in question.

There remains to be considered the point which arises under the statute 3 & 4 Will. 4, c. 30, under which the recorder held that the respondent was not liable to be rated in respect of the burial ground, but with respect to which the Divisional Court expressed the doubt I have already stated. Two points were made by the appellants in connection with that Act, suggesting that it did not carry the exemption for which the respondent contended. The first was that the burial ground was not exclusively appropriated to public religious worship within the meaning

of the Act; and, secondly, that the ground did not fall within the terms "churches, district churches, chapels, meeting houses, or premises," which is the description in the Act of the places exempted. With regard to the first point, it is, to say the least, doubtful whether the ground which is set apart for burial can be said to be exclusively appropriated to public religious worship, and it is not necessary to express a final opinion on this point; for, with regard to the second point, the only word which would cover this ground is the word "premises," and, having regard to the collocation of the words in this short Act, I think that word is really confined to buildings forming part of the buildings of churches, district churches, chapels, and meeting houses, or at any rate to buildings used for similar purposes as such buildings, and is not used in a wide enough sense to include a burial ground such as that in question.

I observe that, in the statute 37 & 38 Vict. c. 20, dealing with the exemption of churches and chapels in Scotland from local rates and assessments, there is express mention of ground exclusively appropriated as burial ground. There may, however, be some reason why these words were expressly introduced into the Act relating to Scotland which is not applicable in England. In my opinion the Act with which we are concerned in this case has not in sufficiently express terms exempted ground such as this from rating.

I think, therefore, the appeal should be allowed.

BIGHAM J. This is an appeal from a judgment of the Divisional Court, affirming a judgment of the Court of quarter sessions for the city of Manchester, whereby it was held that the present respondent, the Rev. J. A. Winstanley, was exempt from liability to pay a poor rate as occupier of certain land known as the Newton Heath Cemetery.

The facts stated are shortly as follows: In 1854 the churchyard of All Saints' Church in Manchester was closed under an order made under the Acts relating to overcrowded burial grounds. It then became necessary to provide accommodation elsewhere for the burial of the dead of the parish, and accordingly a piece of land within a short distance of the church was acquired for that

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purpose by the Commissioners for Building New Churches. This was in the year 1855. Later on, namely, in 1883, an additional piece of land was acquired for the same purpose by the Ecclesiastical Commissioners. The two pieces of land adjoined, and they now form the cemetery in respect of which the rate in question is demanded. The respondent is the rector and incumbent of All Saints' Church. The two pieces of land were acquired under the provisions of the Church Building Acts, the first of which is 58 Geo. 3, c. 45. By s. 33 of that Act it is enacted that the Commissioners may accept any lands for sites of additional churches, not exceeding in quantity in any one place what may be sufficient for the building of a church, providing a churchyard, and making a proper approach thereto, from any person willing to give the same. The section further enacts that every such site when conveyed to the Commissioners and when the church is erected thereon, and notice thereof given to the bishop of the diocese, shall become devoted for ever thereafter to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public worship according to the rites of the Church of England. I mention this latter part of the section because it is set out in the case stated; but I doubt whether it bears in any way on the question we have to consider, for it is apparently confined to cases where a church has been built on the land acquired, and in the present case no building for religious services has been erected on either of the two plots of land. Both the two plots were conveyed to the Commissioners by the dean and canons of Manchester, who were the freeholders, to hold for the purpose of the Church Building Acts "and to be devoted, when consecrated, to ecclesiastical purposes for ever by virtue and according to the true intent and meaning of the said several recited Acts"; and, after their acquisition by the Commissioners, they were consecrated by the bishop "as and for an additional burial ground or cemetery for the interment of the dead of the said parish of All Saints," and the bishop by the sentence of consecration declared that the ground should thenceforth remain separate and set apart from all common and profane uses whatsoever.

By the 8 & 9 Vict. c. 70 (an Act for the further amendment of

the Church Building Acts), s. 13, it is enacted that the freehold of every burial ground of which the Commissioners may have accepted a conveyance shall after consecration vest in the incumbent for the time being of the church to which such burial ground shall belong for the use of the inhabitants of the place for which such burial ground was acquired. The respondent has thus become the freeholder of a cemetery which is by law devoted and by the bishop consecrated exclusively to ecclesiastical purposes, namely, to the burial of the dead according to the rites of the Church. The case then goes on to state the uses to which the respondent puts the cemetery. The particulars are to be found in paragraphs 11 and 12 and in the scheduled scale of charges. He makes charges and receives payment for what is called the purchase of freehold graves according to a certain scale; for reopening graves, for taking down and fixing memorials, for planting, for painting, and for other work connected with the performance of the funerals and the subsequent maintenance of the graves. It appears also that, at the date of the laying of the rate appealed against, the respondent made a charge to meet the proportion of poor rate payable in respect of this cemetery. After payment to himself and his clerk of the customary fees for reading the service, there remained at the end of the year in respect of which the rate in question was laid a net profit from these various charges of 100*l.* 7*s.* 2*d.*, which sum the respondent has retained to his own use. From this sum the overseers have deducted one-sixth, and have so arrived at the rateable value of 83*l.* 10*s.* as entered in the rate appealed against.

In these circumstances it was contended before the learned recorder at quarter sessions that the respondent was not liable to be rated, upon the ground that by the sentence of consecration the cemetery was a site consecrated to public worship according to the rites of the Church of England by reason of the provision of s. 33 of 58 Geo. 3, c. 45, and on the further ground that the cemetery was a place exclusively appropriated to public worship within the meaning of the Act 3 & 4 Will. 4, c. 30. The recorder held that the respondent was exempt under the latter statute, and the question for the opinion of the Divisional Court

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was whether this holding was correct. No other question was submitted to the Divisional Court, and by the terms of the case the judgment of the Court of quarter sessions was to stand or fall according to the answer given to that question. But in the Court below the point was taken that the case did not come within the meaning of the statute of Elizabeth at all, and that therefore no exemption was needed to protect the respondent from liability. The Divisional Court accepted this view, and acted upon it in dismissing the appeal. It thus became immaterial to consider the only question raised on the case, and the Court did not answer it. The case having been argued on the same lines in this Court, I think we must deal with both the points, namely, first, whether the respondent is a rateable occupier within the statute of Elizabeth; and, secondly, if so, whether the statute of William IV. exempts him from liability.

In considering the first point it is worth while to turn to the words of the Act of Parliament itself. The words direct the overseers to raise "by taxation . . . . of every occupier of lands . . . . in the said parish" competent sums of money for the relief of the poor. There are no restrictions; every one who occupies any land in the parish is to be taxed. The object is to raise sufficient money for the needs of the poor and to do so by means of an equal rate on all occupiers. It is obvious that any inequality or exemption in favour of particular occupiers must increase the burden on the others, and therefore any claim to such a preference ought to be clearly proved before it is allowed. Prima facie I think the respondent is liable: the land in respect of which he is rated is without doubt land within the area of the parish; the respondent is the freeholder of it, and, subject to certain rights of the parishioners in and over it, he occupies it; his occupation is permanent and it is beneficial. These circumstances bring the respondent's occupation within the meaning of the statute. On what ground, then, does he claim to escape liability? It is said that this is a churchyard or a burial ground about a church, and never in the history of the poor law has the occupier of such ground been rated in respect thereof. It is further said that this is like a church, and that a church being built on consecrated ground is not rateable, for which proposition

the case of *Wright* v. *Ingle* (1) is cited. It may be that a churchyard has never heretofore been treated as a rateable hereditament, but the mere circumstance that the statute has never been applied is not in my view conclusive that it is not applicable. If churchyards have never in fact been rated, it has probably been because their value to an occupier was regarded by the overseers as nil, and therefore it was thought that they were not worth assessing. In the present case the value to the occupier is substantial, so that it becomes the duty of the overseers to assess the property. The fact that the land is consecrated ground and (perhaps) devoted by statute to ecclesiastical purposes, and the fact that the respondent holds the land for the use of the inhabitants by virtue of s. 13 of the Act of 8 & 9 Vict. c. 70, seem to me to be immaterial. It was pointed out by Coleridge J. in the case of the *Oxford Poor Rate* (2), when dealing with the question of the college chapels, that consecration has no bearing on the question of rateability. He says: "Although the chapel be consecrated and for ever set apart from secular purposes, and so in one sense rendered incapable of producing profit to the occupier, it is no more exempt in the hands of the college than a chapel in a private person's house which he has succeeded in persuading the bishop to consecrate . . . . the consecration indeed is wholly and entirely diverso intuitu and has no essential bearing on the question of rateability." Then does it make any difference that the land may perhaps be said to be devoted to ecclesiastical purposes by virtue of the Church Building Act, 1818, or that the statute which vests the freehold in the respondent declares that he shall be possessed of the land for the use of the inhabitants of the parish? I think not. In my opinion the use to which the respondent puts this land is neither inconsistent with its being devoted to ecclesiastical purposes, nor is it inconsistent with the trust created in favour of the inhabitants. The land is as effectually devoted to ecclesiastical purposes, and as fully held for the benefit of the inhabitants of the parish, as if the respondent did not use it for his own profit. And, even if this were not so, I do not think it would matter, for the duty of the overseers

(1) 16 Q. B. D. 379. (2) 8 E. & B. 184, at p. 211.

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is to assess land whenever a beneficial occupation in fact exists, and it would not be open to the occupier to say in answer to the rate that his occupation was not lawful.

It was suggested during the argument that the respondent's occupation was an occupation on behalf of the public at large, and that therefore the statute of Elizabeth did not apply. It is no doubt true that the public is not assessable to the poor rate, but it is a different thing to say that an individual occupying for public purposes may not be rated; he certainly may be, if (as here) the occupation is such as to yield him a personal profit.

I can find nothing in the facts of this case to distinguish the occupation of the respondent from that of a stonemason or a gardener occupying a yard or land in the parish, and whose business it might be to erect monuments or supply plants for the graves in the cemetery. Such persons would undoubtedly be liable to be rated, and so, therefore, should the respondent. I have examined the authorities which were referred to in the course of the argument and those which were cited in the judgment of the Court below, but I do not think they conflict in any way with the conclusion at which I have arrived, and some of them support it. In *Robson* v. *Hyde* (1) a rate on the occupier of a building, the lease of which contained a covenant that the building should be used only as a chapel for the performance of the services of the Church of England, was held good. The building was not consecrated, and the occupier made a profit by letting the pews. The rate was held good, upon the ground that the building might, by consent of the parties to the lease, be used at any moment for any purpose. The argument against the rate was that the building was a place of public worship, and therefore like a church from which the parson makes a profit of the pews. Dealing with this analogy Buller J., after declaring the analogy to be false, adds: "But . . . . I am very far from being satisfied that a parson or vicar who has the profits of the pews given him by the parish in increase of his benefice is not rateable for such profits"; and, referring to the appellant, he says: "No principles of law any more than the interests of religion prevent the public from calling upon this man for his

(1) Cald. 310.

full proportion." It is, I think, plain that Buller J. would have held the rate good, even if the building had been a consecrated church of which the plaintiff was the parson. The case cited by Mr. Macmorran in support of the proposition that a consecrated church cannot be the subject of a poor rate is *Wright* v. *Ingle*. (1) In that case it was held that a Wesleyan chapel was a "house" within the meaning of the Metropolis Management Acts, and that therefore the trustees (who were held to be the "owners" of the chapel) were liable as frontagers to contribute to the making of a new street. By the trusts of a deed the use of the building was limited to religious worship. In the course of the argument *Robson* v. *Hyde* (2) was cited, and Bowen L.J. pointed out that there the only question was whether there was a beneficial occupation. *Wright* v. *Ingle* (1) decided nothing except that a "house," to be within the meaning of the statutes under consideration, must be a building capable in fact and in law of being used for the habitation of man. The case decided nothing more. It is true that in the judgment it is pointed out that by common law a church, as soon as it is consecrated by the bishop, becomes incapable of being used for any other than religious purposes, and it was said that therefore a church cannot be a "house" within the meaning of the statutes. It cannot be let or used in any way inconsistent with the purposes which it is to serve, whereas a dissenting chapel may be so used without violating the law. But both Cotton L.J. and Bowen L.J. were very careful to point out that they were not dealing with a question of rating at all. Cotton L.J. says: "That is an entirely different question from one of rating"; and so it was, for whether a building may by law be used as a habitation for man, and whether it may have an occupier within the statute of Elizabeth, are obviously questions depending on entirely different considerations. It is true that the parson is not and never can be the "inhabitant" of his church, but he may very well be its occupier within the statute of Elizabeth. If he derives a profit from the land, he is a possible hypothetical tenant within the meaning of the cases decided under the statute, and, subject to any question as to whether he comes within the exceptions in

(1) 16 Q. B. D. 379. (2) Cald. 310.

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Bigham J.

favour of the Crown, he may well be liable to be rated. For these reasons it seems to me that *Wright* v. *Ingle* (1) is of no application to the present case. Two other cases were referred to in the Court below as supporting the respondent's contention, namely, *Wolfe* v. *Surrey County Council* (2) and *Beswick* v. *Alker*. (3) Both these cases turned on the meaning of s. 24 of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), the question in each case being whether a parson claiming to be on a county register "occupied" a house or building or land together with a house or building whereby he acquired a right to vote for a city or borough so as to preclude him from being inserted on the county register. In each case the parson was in receipt of pew rents as part of his stipend, and it was contended that such receipt made him the "occupier" of his church within s. 24 of the Act, so as to give him a vote in the borough and thus disentitle him to be on the county register; and in each case it was held that the receipt of pew rents did not, either alone or taken in conjunction with the legal possession of the church, constitute an "occupation" of a house or building within the section so as to have the effect contended for, and that the section required actual as well as legal possession. In the later of the two cases the Court reserved the question as to whether "occupation" under the Reform Act means an occupation such as will make the occupier liable to be rated to the poor under the statute of Elizabeth. Neither of the cases seems to me to be in point, and, even if they were, I think they are very clearly distinguishable, for here Mr. Winstanley is both in actual and in legal possession of the cemetery—in actual possession by the workmen whom he employs, and in legal possession by virtue of his title as freeholder.

There then remains the question of exemption under the statute of William IV. This, as I have already said, is the only point on which the case was stated, and it is the point on which the learned recorder found in favour of the respondent. As I read the judgment of the King's Bench Division, the judges were not disposed to adopt the view of the learned recorder, and

(1) 16 Q. B. D. 379. (2) [1905] 1 K. B. 439.
(3) L. R. 8 C. P. 265.

would have differed from him if it had been necessary for them to deal with the point. I think myself that the learned recorder was wrong in his interpretation of the statute. The statute recites that it is expedient that churches, chapels, and other places exclusively appropriated to public religious worship should be exempt from the payment of poor rates. It is, in my opinion, impossible to say that this cemetery comes within the meaning of those words. It is true that in the enacting part of the section the words are extended and include the expression "premises," but that expression carries the matter no further; it must be read as ejusdem generis with churches and chapels. Moreover, the operation of the statute is confined to such part of the premises as may be exclusively appropriated to public religious worship. Here, in my opinion, neither the cemetery itself, nor any part of it, can be said to be so appropriated.

For these reasons I think the respondent is liable to pay the rate in question, and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Chester, Broome & Griffithes, for Crofton, Craven & Worthington, Manchester.*

Solicitors for respondent: *Rooke & Sons, for Orford & Sons, Manchester.*

E. L.

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Feb. 11.

CRUMP *v.* LEWIS.

Local Government—Urban District Councillor—Disqualification—Paid Office under the Council—Distress Committee—Registrar and Inquiry Agent—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 46, *sub-ss.* 1, 8—*Unemployed Workmen Act*, 1905 (5 *Edw.* 7, *c.* 18).

By s. 46 of the Local Government Act, 1894, a person is disqualified for being a member of a district council if he holds any paid office under the council.

A distress committee established for an urban district under the Unemployed Workmen Act, 1905, and the Urban Distress Committees (Unemployed Workmen) Order, 1905, is by virtue of that Act and Order constituted a committee of the council of the urban district for which it is established; and a person who holds a paid office under such a committee holds a paid office under the district council within the meaning of s. 46 of the Local Government Act, 1894.

Case stated by justices of the peace for the county of Essex.

At a Court of summary jurisdiction for the division of the half-hundred of Beacontree an information was preferred by George William Crump, hereinafter called the appellant, against Thomas Townsend Lewis, hereinafter called the respondent, for that the respondent, on April 19, 1907, at the parish of Walthamstow, did act or vote as a district councillor of the urban district council of Walthamstow, he being disqualified for being a member of such council by holding a paid office under the said council, to wit, the office of a registrar or inquiry agent for the purposes of the Unemployed Workmen Act, 1905, at a weekly salary of 1*l.* 10*s.*, contrary to the statute in such case made and provided, namely, the Local Government Act, 1894, s. 46. (1)

On the hearing of the information on July 13, 1907, the following facts were proved or admitted:—

The urban district of Walthamstow has a population, according

(1) The Local Government Act, 1894:—Sect. 46: "(1.) A person shall be disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or of a board of guardians if he . . . .

"(*d*) holds any paid office under the parish council or district council or board of guardians, as the case may be; . . . .

"(8.) If any person acts when disqualified, or votes when prohibited under this section, he shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds."

to the last census, of not less than 50,000, and there had been established, by order of the Local Government Board, a distress committee for the said urban district under the provisions of the Unemployed Workmen Act, 1905. (1)

(1) Unemployed Workmen Act, 1905:—Sect. 1: "(1.) For the purposes of this Act there shall be established, by order of the Local Government Board under this Act, a distress committee of the council of every metropolitan borough in London, consisting partly of members of the borough council and partly of members of the board of guardians of every poor law union wholly or partly within the borough and of persons experienced in the relief of distress, and a central body for the whole of the administrative county of London, consisting partly of members of, and selected by, the distress committees and of members of, and selected by, the London County Council, and partly of members co-opted to be additional members of the body, and partly, if the order so provides, of persons nominated by the Local Government Board, but the number of persons so co-opted and nominated shall not exceed one-fourth of the total number of the body, and every such order shall provide that one member at least of the committee or body established by the order shall be a woman. . . . .

"(2.) The distress committee shall make themselves acquainted with the conditions of labour within their area, and when so required by the central body shall receive, inquire into and discriminate between any applications made to them from persons unemployed; . . . ."

"(6.) Any expenses of the central body under this Act, and such of the expenses of the distress committees under this Act as are incurred with the consent of the central body, shall be defrayed out of a central fund under the management of the central body, which shall be supplied by voluntary contributions given for the purpose, and by contributions made on the demand of the central body by the council of each metropolitan borough in proportion to the rateable value of the borough and paid as part of the expenses of the council:

"Provided that—

"(*a*) A separate account shall be kept of all sums supplied by contributions made by the councils of the metropolitan boroughs, and no expenses except—

"(i.) establishment charges of the central body and distress committees, including the expenses incurred by them in respect of labour exchanges and employment registers, and in the collection of information; . . . .

shall be paid out of that account."

Sect. 2: "(1.) There shall be established by order of the Local Government Board for each municipal borough and urban district with a population, according to the last census for the time being, of not less than fifty thousand, and not being a borough or district to which the provisions of s. 1 of this Act have been extended, a distress committee of the council for the purposes of this Act, with a similar constitution to that of a distress committee in London, and the distress committee so established shall, as regards

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The council for the said urban district duly appointed the members of the distress committee, which was constituted as

their borough or district, have the same duties and powers, so far as applicable, as are given by this Act to the distress committees and central body in London. . . ."

Sect. 4: "(3.) The Local Government Board may make regulations for carrying into effect this Act, and may by those regulations, amongst other things, provide— . . . .

"(*d*) for the employment of officers and provision of offices . . . ."

The Urban Distress Committees (Unemployed Workmen) Order, 1905:—Art. 1: "In this Order, unless the contrary intention appears:— . . .

"(*c*) The expression 'the Act' means the Unemployed Workmen Act, 1905; and the expressions 'borough' and 'urban district' mean and include each municipal borough and each urban district with a population according to the last census for the time being of not less than fifty thousand, and not being a borough or district to which the provisions of s. 1 of the Act have been extended."

Art. 2: "(1.) There shall be established a distress committee of the council of each . . . . urban district.

"(2.) The distress committee shall comprise the total number of members specified in relation to the . . . . urban district in column 6 of the schedule to this Order.

"The total number of members specified as aforesaid shall consist of—

"(i.) Such number of members appointed by the council from their own body as in relation to the . . . . urban district named in column 1 of the schedule to this Order is specified in column 3 of that schedule opposite to the name of the . . . . urban district;

"(ii.) Such number of members appointed by the council and being persons selected by the board of guardians of each poor law union wholly or partly in the . . . . urban district as in relation to the . . . . urban district and the poor law union named in columns 1 and 2 of the schedule to this Order is specified in column 4 of that schedule, opposite to the names of the . . . . urban district and poor law union; and

"(iii.) Such number of members (of whom one at least shall be a woman) appointed by the council from outside their own body, but from persons experienced in the relief of distress as is specified in relation to the . . . . urban district in column 5 of the schedule to this Order."

Art. 4: "(1.) A member of a distress committee who is a member of the council . . . . shall continue in office until he dies, or resigns, or goes out of office as a member of the council by whom he was appointed, ... or until he becomes disqualified by virtue of this Order."

Art. 6: "Section 46 of the Local Government Act, 1894, shall apply to a distress committee and to any member as if, with the necessary

follows: Twelve members of the said council; eight members of the board of guardians nominated by that board; and five other persons appointed by the said council from outside their own body.

The expenses of the distress committee are defrayed out of a fund supplied by voluntary contributions given for that purpose, and by contributions made on the demand of the committee by the urban district council. The establishment charges of the distress committee, including the expenses incurred by them in respect of employment registers and in the collection of information, are defrayed out of the contributions so made by the council. The accounts of the distress committee are separate and distinct from those of the council. They form the subject of a separate and distinct audit by the Local Government Board auditor, and the accounts are submitted direct to the auditor by the committee through their secretary.

The distress committee appoint their own servants, provide their own officers, and do all such acts and things as are necessary to carry out the purposes for which the committee has been formed, free from the control of the council. The committee does not report to the council, and the council does not review the proceedings of the committee. The functions of the committee are not delegated to them by the council.

The distress committee on December 4, 1906, appointed the respondent to the office of registrar and inquiry agent at a weekly salary of 1*l.* 10*s.*, and he continued in that office and received that salary until April 25, 1907.

The respondent at the time of his appointment was a duly elected councillor of the urban district council of Walthamstow, and he continued in that office until the date of the hearing of the information.

On April 19, 1907, the respondent was present at a meeting of

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modifications, the said section were herein re-enacted, and in terms made applicable; and every person disqualified by the said section as so applied shall become disqualified by virtue of this Order."

The Regulations (Organization for Unemployed), 1905:—Art. 11: "A distress committee and a central body may each employ such officers as are necessary for the efficient exercise of the powers and the efficient discharge of the duties of the distress committee or central body."

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the urban district council, and he then voted in his capacity of a councillor.

On the part of the appellant it was contended that, inasmuch as the respondent was appointed to a paid office by the distress committee, which had itself been appointed by the urban district council, and as the salary of the respondent was paid out of the contributions made by the council, the respondent held a paid office under the council; and that this view was supported by the fact that in s. 2 of the Unemployed Workmen Act, 1905, the distress committee is described as a distress committee of the council.

On the part of the respondent it was contended that the duty which devolved upon the council of appointing the distress committee was only a convenient and appropriate mode of bringing it into existence, and that, having once appointed such committee, the council had no further duties, rights, or responsibilities in regard to, and no control over, the committee either as to the appointment or payment of officers or in any other way, and that, having regard to these considerations and the foregoing facts, it could not be said that the respondent held a paid office under the urban district council, but under an independent authority, namely, the distress committee. It was also contended that this view was strengthened by the fact that in carrying out their duties the distress committee did not exercise functions delegated to them by the urban district council, and that the council had, so far as those functions are concerned, no duties which they could delegate.

The justices were of opinion that the respondent did not hold a paid office under the Walthamstow Urban District Council, and dismissed the information, but stated for the opinion of the King's Bench Division a special case in which the foregoing facts were set out.

Thornton Lawes (*George Borwick* with him), for the appellant.

The *Respondent* appeared in person.

The arguments were the same as those urged before the justices.

The following enactments and orders were referred to: The

Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46; the Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), ss. 1, 2, and 4; the Urban Distress Committees (Unemployed Workmen) Order, 1905, arts. 1, 2, 4, and 6; and the Regulations (Organization for Unemployed), 1905. (1)

LORD ALVERSTONE C.J. I have come to the conclusion that the respondent was holding a paid office under the urban district council within the meaning of s. 46, sub-s. 1 (*d*), of the Local Government Act, 1894. In the Unemployed Workmen Act, 1905, the distress committees are not only spoken of, but are treated as, committees of the district councils. The funds for the payment of the officers and the establishment charges of the committees are paid out of sums contributed by the urban district councils. The respondent contends that these committees are not to be regarded as committees of the urban district councils, because they consist not only of co-opted members of the councils, but of other co-opted persons who are not members of the councils; but these latter are in fact appointed by the councils, and I think that persons appointed to paid offices by the committees are to be regarded as holding paid offices under the councils. The Regulations (Organization for Unemployed), 1905, art. 11, authorize the appointment of paid officers by the committee; the salaries of those officers must be part of the establishment charges which are defrayed out of the funds of the general body. The intention of s. 46 (*d*) of the Local Government Act, 1894, was to prevent the mischief of paid officers acting and voting as members of the body which pays them.

In my opinion art. 6 of the Urban Distress Committees (Unemployed Workmen) Order, 1905, read into s. 46 of the Local Government Act, 1894, does not alter the scheme of that section further than by adding a provision to it. The joint effect of these enactments is, reddendo singula singulis, to provide that a person who holds any paid office under a parish council shall be disqualified for being elected or being a member or chairman of a council of a parish; a person holding a paid office under a

(1) See notes, ante, pp. 858—861.

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district council shall be disqualified for being elected or being a member or chairman of a council of a district (other than a borough); the same disqualification for being elected or being a member of a board of guardians applies to one who holds a paid office under a board of guardians; and a person shall be disqualified from being elected or being a member of a distress committee if he holds any paid office under a distress committee. But that provision does not touch the main question in this case, namely, whether a man holding a paid office under a distress committee holds a paid office under the district council, which, as I have said, I think he does. This case must therefore go back to the justices; but in the circumstances they ought only to inflict a nominal penalty.

A. T. LAWRENCE J. I am of the same opinion. I think the distress committee is a committee of the district council, and that officers of the committee, being paid out of the funds of the council, are well within the mischief which the Legislature sought to avoid when it imposed the disqualification contained in s. 46 of the Local Government Act, 1894. The principle of that enactment is that the paid officers of a body should not be members of that body.

SUTTON J. I agree.

Appeal allowed.

Solicitor for appellant: *C. T. Wilkinson.*

W. H. G.

LORD SUFFIELD *v.* COMMISSIONERS OF INLAND REVENUE.

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Revenue—Stamp Duty—"Security for Money or Stock without Limit"—Expression of Opinion by Commissioners as to Duty chargeable—Mortgage—Trust Deed for securing Debenture Stock—Principal or primary Security—Security auxiliary or by way of further Assurance—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 12, *sub-s.* 6 (*b*); *s.* 88; *First Schedule*, "*Mortgage*," &c. (2.) —*Revenue Act*, 1903 (3 *Edw.* 7, *c.* 46), *s.* 7.

By an indenture dated May 28, 1897, certain freehold and leasehold hereditaments were, by direction of a brewery company, respectively conveyed and demised to trustees. The indenture contained a covenant to surrender to the use of the trustees certain copyholds, and an assignment to them of a goodwill and other matters. By the indenture it was agreed that the trustees should stand possessed of the hereditaments and premises upon the trusts contained in an indenture dated May 20, 1897.

The indenture of May 20, 1897, after reciting (inter alia) that the company had determined to issue certain debenture stock, to be constituted and secured as therein provided, contained a covenant by the company with the trustees that the company would cause the hereditaments to be forthwith conveyed to and vested in the trustees for securing the payment by the company of the debenture stock and the dividends thereon, with a provision for reconveyance to the company upon proof that all the stockholders had been paid off or satisfied and upon payment of all costs incurred by the trustees in relation to the indenture. The indenture also created a floating charge upon all the property and assets for the time being of the company. In addition to other provisions for the maintenance and enforcement of the security thereby created, the indenture contained (clause 33) a provision that if default should be made in keeping the mortgaged premises in a good state of repair and working condition, and so insured as in the indenture specified, the trustees might from time to time repair or renew, or insure (as the case might require), the mortgaged premises or any part thereof, and the company would on demand repay to the trustees every sum of money expended by them for the above purposes, with interest at the rate of 5 per cent. per annum from the time of the same having been expended, and until such repayment the same should be a charge upon the mortgaged premises.

The indenture was stamped with 2*s.* 6*d.* per cent. upon 230,000*l.*, the amount to which the stock was limited, and 23,000*l.*, the premium at which the stock was redeemable at the company's option.

Debenture stock to the amount of 223,200*l.* was subsequently issued by the company upon the security of the indentures:—

Held, that clause 33 of the indenture of May 20, 1897, although one of the provisions referred to in the indenture of May 28, 1897, subject to

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which the trustees were to stand possessed of the hereditaments, did not make the latter indenture a security for money or stock without limit within the meaning of s. 12, sub-s. 6 (*b*), of the Stamp Act, 1891, and that therefore the Commissioners of Inland Revenue were bound to adjudicate the liability of the indenture to duty.

Held, further, that the indenture of May 20, 1897, was the primary security, and the indenture of May 28, 1897, a mortgage by way of further assurance, within the meaning of the head of the First Schedule to the Stamp Act, 1891—"Mortgage, Bond, Debenture, Covenant," sub-head (2.)—and that therefore, in addition to the duty to which the indenture of May 28, 1897, was liable as a conveyance on sale, duty at the rate of 6*d.* per cent. upon 223,200*l.*, the amount of the debenture stock issued, was payable upon it.

Sect. 88 of the Stamp Act, 1891, contemplates that a primary security may be a deed on which, at the time it is executed, there has been no money lent or advanced.

Sect. 7 of the Revenue Act, 1903, is not retrospective, and the duty which is payable on a deed is that which was payable at the date of its execution.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On February 20, 1902, an instrument, dated May 28, 1897, was presented on behalf of the Right Hon. Lord Suffield (hereinafter called the appellant) and John Whitaker Cooper, since deceased, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The indenture was made between William Barwell Barwell and Ernest Orger Lambert of the first part, the Worcestershire Brewing and Malting Company, Limited (hereinafter called the company) of the second part, and certain trustees for debenture stockholders in the company, who were so constituted by virtue of a trust deed dated May 20, 1897, hereinafter more particularly referred to (which persons are hereinafter called "the trustees"), of the third part. By this indenture—after reciting that Barwell and Lambert had agreed with the company for the sale to it of certain freehold, copyhold, and leasehold hereditaments for the sum of 108,190*l.*, and that for the purpose of the Act of Parliament imposing ad valorem duties upon conveyances on sale it had been agreed that the sum of 104,690*l.*, part of the sum of 108,190*l.*, should be the price or

consideration for the freehold and leasehold hereditaments, and that the sum of 3500*l.*, the residue thereof, should be the price for the copyhold hereditaments, and that it had also been agreed that Barwell and Lambert should assign certain goodwill and the benefit of certain scheduled agreements and of a covenant in relation to the business, and that the company was desirous that the hereditaments and premises should be conveyed to the trustees in manner thereinafter appearing—it was witnessed that in pursuance of the agreement, and in consideration of the sum of 104,690*l.* then paid by the company to Barwell and Lambert, they, as beneficial owners, by direction of the company thereby granted unto the trustees the freehold hereditaments described in the first schedule thereto; and it was also witnessed that in further pursuance of the agreement, and in consideration of the sum of 3500*l.* then paid by the company to Barwell and Lambert, they, as beneficial owners, by the direction of the company thereby covenanted with the trustees to forthwith surrender to the use of the trustees the copyhold hereditaments described in the second schedule. The indenture also contained a demise for the term thereby granted of the leasehold hereditaments described in the first schedule, and also an assignment of the goodwill and certain other matters described in the fourth schedule to the indenture. By the indenture it was agreed and declared that the trustees, their heirs, executors, administrators and assigns, should respectively stand possessed of the hereditaments and premises thereby granted upon the trusts and subject to the powers and provisions contained in the indenture of May 20, 1897.

The indenture of May 20, 1897, was made between the company of the one part and the trustees of the other part. The deed recited that the company had contracted to purchase certain freehold, copyhold, and leasehold hereditaments (being the hereditaments mentioned in the schedules to the indenture of May 28, 1897), and that the company had determined to issue certain debenture stock, to be constituted and secured as thereinafter provided.

Clause 2 provided that the company would, as and when the stock or any part thereof ought to be paid off or redeemed in

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accordance with the provisions of the deed, pay to the stockholders whose stock ought to be paid off or redeemed the nominal amount of the stock held by them respectively, together with any additional sum or bonus payable in respect thereof.

Clause 3 provided that the stock should be held subject to the conditions set forth in the second schedule thereto.

By clause 4 the total amount of the stock was limited to 230,000*l.*

Clause 5: "The company will cause the hereditaments and properties described in the first schedule hereto to be forthwith conveyed to and vested in the trustees upon the trusts hereof free from incumbrances and will for that purpose execute and do all such assurances and things as the trustees may reasonably require. The freeholds specified in the first part of the said schedule shall be conveyed to the trustees in fee simple. The copyholds specified in the second part of the said schedule shall be surrendered to the use of the trustees or their nominees in fee simple according to the customs of the several manors of which the same are respectively held. The leaseholds specified in the third part of the first schedule shall be assigned to the trustees or at their option shall be demised to them for the respective residues of the terms for which the same are respectively held except the last three days of each of the said terms. The company shall make out to the reasonable satisfaction of the trustees a good title to the said freehold copyhold and leasehold hereditaments but the trustees may accept any title or evidence of title to the said hereditaments and premises respectively which they may think sufficient and may accept as sufficient any certificate report or opinion on the title or evidence of title to any of the said hereditaments and premises including any certificate report or opinion procured by the company or any of its predecessors in title."

Clause 6: "All moneys payable by subscribers for or holders of the stock in respect of the stock issued at any time before all the said hereditaments and premises shall have been assured to and vested in the trustees or their nominees in manner aforesaid shall be made payable to and be received by bankers appointed by the company and approved by the trustees and all moneys so

received shall be carried to the credit of the trustees and shall be applied by them in or towards payment of the moneys from time to time payable by the company in respect of the purchase of the said hereditaments and premises. On any such payment being made the trustees may if they so think fit require the hereditaments and premises in respect of which the payment is made to be assured to them in such manner as they may direct or may require the title deeds relating thereto to be deposited with them or with some person on their behalf. After all the said hereditaments and premises specified in the first schedule hereto shall have been assured to and vested in the trustees or their nominees in manner aforesaid any balance of the moneys so carried to the credit of the trustees shall be paid to the company."

Clause 8: "The company hereby charges in favour of the trustees all its property and assets for the time being (including its uncalled capital) with the payment of all moneys for the time owing on the security of these presents. Such charge shall be a floating charge so that the company may sell lease exchange charge or otherwise deal with the said property and assets (except the hereditaments and property hereby covenanted to be conveyed to and vested in the trustees) or any part thereof in the ordinary course of its business."

Clause 9: "The trustees shall permit the company to hold and enjoy all the said hereditaments property and premises hereinbefore respectively covenanted to be conveyed or hereby charged (hereinafter called 'the mortgaged premises' which expression shall also include all hereditaments and other property for the time being vested in the trustees upon the trusts hereinafter declared) and to carry on therein and therewith the business or any of the businesses authorized by the memorandum of association of the company and to call up and receive any of its capital until the security hereby constituted becomes enforceable as hereinafter provided and then the trustees may in their discretion without any such request as next hereinafter mentioned and shall upon the request in writing of the holder or holders of stock to the nominal amount of 100,000*l.* (but in either case without any further consent on the part of the company or its assigns) enter upon or take possession of the mortgaged premises

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or any part thereof and may at the like discretion and shall upon the like request sell call in collect and convert into money the same or any part thereof with full power to sell or concur with any other person in selling the mortgaged premises or any part thereof. . . . ."

In addition to other provisions for the maintenance and enforcement of the security thereby created, the indenture contained a provision enabling the trustees in case of default to appoint a receiver of the property of the company.

Clause 13: "The trustees shall hold the moneys to arise from any sale calling in collection or conversion under the foregoing trust in that behalf upon trust that they shall thereout in the first place pay or discharge any prior charges or incumbrances to which the sale is not made subject and in the next place pay or retain the costs and expenses incurred in or about the execution of such trust or otherwise in relation to these presents and shall apply the residue of the said moneys (first) in or towards payment to the stockholders pari passu in proportion to the amount due to them respectively and without any preference or priority of all arrears of interest remaining unpaid on the stock held by them respectively (secondly) in or towards payment to the stockholders pari passu in proportion to the amounts of stock held by them respectively and without any preference on account of priority of issue or otherwise of all principal moneys due in respect of the stock held by them respectively and whether such principal moneys shall or shall not then be payable according to the terms of these presents and (thirdly) shall pay the surplus (if any) of such moneys to the company or its assigns."

Clause 14 provided that if the moneys at any time applicable or divisible under clause 13 should amount to less than 10 per cent. on the whole amount of the stock then outstanding, or if it should be impracticable or inconvenient to apply or divide the whole of any such moneys, the trustees might at their discretion invest such moneys in investments upon which trustees are by law authorized to invest trust moneys until the investments and accumulations of income thereof should amount to a sum which, in the opinion of the trustees, would be capable of being

conveniently applied and divided under clause 13, and they should then be applied and divided accordingly.

Clause 18 provided that at any time before the security constituted by the deed should have become enforceable the trustees might, at the request and cost of the company, sell or lease or concur in selling or leasing any of the mortgaged premises, and accept or concur in accepting a surrender of any lease of the mortgaged premises or any part thereof, and exchange or concur in exchanging any of the hereditaments for other hereditaments suitable for the purpose of the company; and that the trustees might from time to time acquire a new lease of any leasehold hereditaments for the time being comprised in the security, or of any other hereditaments suitable for the purposes of the company, at such rent and subject to such covenants and conditions as might seem expedient.

Clause 19 provided that the trustees should hold all net capital moneys arising under clause 18 upon trust (subject to the application of the same or any part thereof for any of the purposes of that clause) to lay out the same or any part thereof, if they should think fit, in the construction, erection, or improvement of any buildings, erections, or works suitable for the purposes of the company.

Clause 20: "Subject as aforesaid the trustees shall invest the net capital moneys referred to in the last preceding clause hereof upon some or one of the investments hereinbefore mentioned with power from time to time at their discretion to vary such investments and with power (until the trust for conversion under clause 9 shall arise) to resort to any such last mentioned investments for any of the purposes for which such proceeds are under clause 19 hereof authorized to be expended. And subject as aforesaid the trustees shall stand possessed of the said investments upon trust until the said trust for conversion shall arise to pay the income thereof and any net moneys in the nature of income arising under clause 18 hereof to the company or its assigns and after the said trust for conversion shall have arisen shall hold the said investments and the income thereof respectively and net moneys in the nature of income upon and for the trusts and purposes hereinbefore expressed concerning the

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moneys to arise from any such sale calling in collection and conversion under the said trust for conversion. Provided always that in default of such trust for conversion arising and after payment and satisfaction of all moneys intended to be secured by these presents the said investments and the income thereof and net moneys last aforesaid shall be held in trust for the company or its assigns."

Clause 22 empowered the trustees to borrow money on the security of the mortgaged premises, or any part thereof, for the purpose (inter alia) of paying off or discharging any mortgage or charge for the time being existing on the mortgaged premises in priority to the security created by the deed.

Clause 33: "The company will not during the continuance of this security pull down remove or destroy any buildings or erections or any fixed works machinery or plant for the time being subject to this security without the previous consent of the trustees except in any case where such pulling down removal or destruction shall be rendered necessary by such buildings erections works machinery or plant being out of repair injured or worn out and in that case will replace the same by others of a similar nature and of at least equal value And also will renew and replace all machinery tools implements utensils carts waggons and other effects at any time used for the purpose of or in connection with the business of the company when and as the same shall be worn out injured lost or destroyed and will at all times keep the said buildings erections works machinery plant tools utensils and effects in good repair and working condition and will permit the trustees and such persons as they shall from time to time in writing for that purpose appoint to enter into and upon the lands buildings and works of the company to view the state and condition thereof and of all plant machinery implements and effects in or upon the same respectively and will insure and keep insured such of the mortgaged premises as shall be of an insurable nature against loss or damage by fire to their full value in such office as the trustees shall approve and will duly pay the premiums and other sums of money payable for that purpose and (if required) from time to time produce to the trustees every such policy of insurance and deliver to the trustees

the receipt for every such payment and will apply all moneys to be received by virtue of any such insurance in making good any loss or damage by fire which may have been caused to the mortgaged premises and if default shall be made in keeping the mortgaged premises in a good state of repair and working condition and so insured as aforesaid the trustees may from time to time repair or renew or insure (as the case may require) the mortgaged premises or any part thereof and the company will on demand repay to the trustees every sum of money expended by them for the above purposes with interest at the rate of 5 per cent. per annum from the time of the same having been expended and until such repayment the same shall be a charge upon the mortgaged premises."

Clause 34 provided that the remuneration therein mentioned should be paid by the company to the trustees, and that the company would pay to them all expenses which they might incur in relation to the trusts, and would also (in addition to the rights of indemnity by law given to trustees) at all times keep indemnified each of the trustees and his estate against all claims in respect of the execution of the trusts, and that the trustees might retain out of any moneys in their hands the amount of any such remuneration and expenses.

Clause 37: "Upon proof being given to the reasonable satisfaction of the trustees that all the stockholders have been paid off or satisfied and upon payment of all costs charges expenses and payments incurred or made by the trustees in relation to these presents the trustees will at the request and cost of the company reconvey and release to the company the mortgaged premises or such part thereof as may remain vested in them freed and discharged from the trusts herein contained."

The second schedule to the deed contained the following (amongst other) conditions:—

"1. At any time after the 30th day of June 1909 the company may give the stockholders or any of them not less than six calendar months' notice of its intention to redeem the stock held by them at the price of 110*l.* for every 100*l.* of stock and at the expiration of the notice such stock will be redeemed accordingly. . . . ."

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"2. The stock shall carry interest at the rate of 4¼ per cent. per annum and the company will pay to the stockholders interest at that rate on the amount of stock held by them respectively on the first day of January and the first day of July in every year."

The deed was stamped with duty at 2*s.* 6*d.* per cent. upon the sum of 230,000*l.*, the amount to which the stock was limited, and 23,000*l.*, the premium at which the stock was redeemable at the company's option. Debenture stock to the amount of 223,200*l.* was subsequently on or about December 10, 1897, issued by the company upon the security of the indentures of May 20 and 28, 1897.

The Commissioners, being of opinion that clause 33 of the indenture of May 20, 1897, was one of the powers and provisions referred to in the indenture of May 28, 1897, subject to which (as hereinafter mentioned) it was by the last-mentioned indenture agreed and declared that the trustees should stand possessed of the hereditaments therein mentioned, and consequently that the indenture of May 28, 1897, being an instrument chargeable with ad valorem duty, was an instrument made as a security for money or stock without limit within the meaning of s. 12, sub-s. 6 (*b*), of the Stamp Act, 1891, refused to adjudicate the liability of the same to duty.

The appellant and Cooper thereupon withdrew the instrument from adjudication, and on July 13, 1907, the appellant retendered the same for adjudication, forwarding at the same time a copy of another indenture, dated July 3, 1907, which he contended released clause 33 of the indenture of May 20, 1897, so far as it operated, or could operate, as a charge upon the premises included in the indenture of May 28, 1897, and in view of such release again required the Commissioners to adjudicate the liability of the instrument to duty. The Commissioners were of opinion that the execution of the indenture of July 3, 1907, did not render the indenture of May 28, 1897, an instrument with reference to which they could be required to express their opinion under s. 12, sub-s. 1, of the Stamp Act, 1891 (1),

(1) Stamp Act, 1891, s. 12, sub-s. 1: "Subject to such regulations as the Commissioners may think fit to make, the Commissioners may be required by any person to express their opinion with reference

inasmuch as it did not in any way affect the nature of such instrument at the date of the execution thereof, but at the request of

to any executed instrument upon the following questions:

"(*a*) Whether it is chargeable with any duty;

"(*b*) With what amount of duty it is chargeable."

Sub-s. 6 provides as follows:

"(*b*) Nothing in this section shall extend to any instrument chargeable with ad valorem duty, and made as a security for money or stock without limit; . . . ."

Sect. 14, sub-s. 4: "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Sect. 15, sub-s. 1: "Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty."

Sub-s. 2: "In the case of such instruments hereinafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

"(*a*) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed. . . . .

"(*d*) The instruments and persons to which the provisions of this sub-section are to apply are as follows:—

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Mortgage, bond, debenture, covenant, ...	The mortgagee or obligee; . . . .

Sect. 88, sub-s. 1: "A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited."

Sub-s. 2: "Where such total amount is unlimited, the security is to be available for such an amount only as the ad valorem duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made."

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the appellant they provisionally, and without prejudice to the objection, agreed to assess the same with duty under s. 12, sub-s. 1, of the Stamp Act, 1891, leaving the preliminary question of jurisdiction to be dealt with by the Court. The Commissioners were of opinion that if clause 33 of the indenture of May 20, 1897, was to be treated as excluded from that indenture, and accordingly as not applicable to the indenture of May 28, 1897, the duty payable upon the latter instrument would be—(1.) conveyance on sale duty at the rate of 10*s.* per cent. upon 104,690*l.*, the price of the hereditaments in the schedules mentioned, under the head in the First Schedule to the Stamp Act, 1891, "Conveyance on Sale"; (2.) duty at the rate of 6*d.* per cent. upon 223,200*l.*, the amount of the debenture stock issued as aforesaid, under the head in the First Schedule to the Stamp Act, 1891, "Mortgage, Bond, Debenture, Covenant," sub-head (2.); the total duty under the first head being 523*l.* 10*s.*, and under the second head 55*l.* 16*s.*

No question was raised as to the duty payable under the first head, nor as to the quantum of duty payable under the second head, provided ad valorem duty in excess of 10*s.* was chargeable, and provided that the amount of such duty was not limited by s. 7 of the Revenue Act, 1903.

"FIRST SCHEDULE.

"Stamp Duties on Instruments.

"Conveyance or transfer on sale,

"Of any property . . . .

£ *s.* *d.*

"Where the amount or value of the consideration for the sale exceeds £300 . .

"For every £50 and also for any fractional part of £50 of such amount or value . . . 0 5 0"

"Mortgage, Bond, Debenture, Covenant . . . .

"(2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:

£ *s.* *d.*

"For every £100, and also for any fractional part of £100, of the amount secured . . 0 0 6"

Revenue Act, 1903, s. 7: "The whole amount of duty payable under or by reference to paragraph (2.) of the heading 'Mortgage, Bond, Debenture, Covenant and Warrant of Attorney' in the First Schedule to the Stamp Act, 1891, on any instrument being a collateral or auxiliary or additional or substituted security or by way of further assurance, shall not exceed ten shillings."

The appellant contended as follows:—

(1.) That the duty at the rate of 6*d.* per cent. upon 223,200*l.*, the amount of the debenture stock, was not payable under the head in the First Schedule to the Stamp Act, 1891, "Mortgage, Bond, Debenture, Covenant," sub-head (2.);

(2.) That in any case any such duty was limited by the operation of s. 7 of the Revenue Act, 1903.

The questions for the opinion of the Court were:—

(1.) Whether the Commissioners were bound under s. 12 of the Stamp Act, 1891, to assess the indenture of May 28, 1897, with duty;

(2.) If so, whether the instrument was chargeable with the duties aforesaid; and, if not,

(3.) With what duties the instrument was chargeable.

Danckwerts, K.C., and *Whately*, for the appellant. The question is whether the Commissioners are precluded from adjudicating upon the indenture of May 28, 1897, on the ground that it is a security for an advance without limit. The deed of May 20, 1897, contains a covenant by the company, who are to remain in possession, to build, repair, and renew. It is a covenant with the trustees, who could have enforced it at law by suing for damages. The trustees were not bound to enforce the security. A deed which is merely accessory to the principal deed is not liable to stamp duty as a security. The deed of May 28, 1897, is not a security for money without limit. If the Commissioners are right as to the effect of clause 33 of the deed of May 20, 1897, the same argument would apply equally to clause 13. A "security" does not necessarily mean something hypothecated: *National Telephone Co.* v. *Inland Revenue Commissioners* (1); *Speyer* v. *Inland Revenue Commissioners.* (2)

The present case comes within the principle of the decisions in *Doe d. Merceron* v. *Bragg* (3); *Wroughton* v. *Turtle* (4); *Doe d. Scruton* v. *Snaith* (5); *Darke* v. *Williamson.* (6) Assuming the deed of May 28, 1897, was originally a security for an

(1) [1900] A. C. 1.
(2) [1907] 1 K. B. 246.
(3) (1838) 8 A. & E. 620.
(4) (1843) 11 M. & W. 561.
(5) (1832) 8 Bing. 146.
(6) (1858) 25 Beav 622.

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unlimited amount, as soon as the release was executed it became limited, and was proper to be adjudicated on. The position was then the same as if clause 33 of the deed of May 20, 1897, had never operated as a charge on the premises included in the deed of May 28, 1897. The word "made" in s. 12, sub-s. 6, of the Stamp Act, 1891, does not mean that the instrument is made originally as a security without limit, but that it is in fact so made when the instrument is presented to the Commissioners. The deed of May 28, 1897, ought, therefore, to have been adjudicated upon. The deed of May 20, 1897, contemplates the mortgagors remaining in possession of the premises and working the business. There is no provision in clause 33 of that deed which is not reasonably necessary for this form of security. The clause comes into operation entirely at the option of the mortgagors. Unless they commit a default the clause has no effect. Any sum expended by the trustees under the clause would be money paid by them in doing that which the mortgagors ought to have done. The clause introduces nothing beyond what the law would imply. Immediately the company by making default requests the trustees to incur the expenditure, an indemnity is implied by law. There is therefore nothing which would not be implied if clause 33 were not in the deed. Clauses 34 and 37 also express the same indemnity which the law would imply. *Wroughton* v. *Turtle* (1), *National Telephone Co.* v. *Inland Revenue Commissioners* (2), and *Speyer* v. *Inland Revenue Commissioners* (3) shew that bills of exchange and promissory notes are securities for money, and if the argument on behalf of the Crown is upheld great confusion will be introduced. The true principle is that, where a mortgage contains an express obligation to do an act of which the law would compel performance, nothing is added to the stamp duty merely by reason of the express provision that the obligation shall be performed. The express provision is merely accessory to the security: *Pruessing* v. *Ing* (4); *Wills* v. *Noott* (5); *Pierpoint* v. *Gower*. (6) A trustee has an implied right to an

(1) 11 M. & W. 561.
(2) [1900] A. C. 1.
(3) [1907] 1 K. B. 246.
(4) (1821) 4 B. & Ald. 204.
(5) (1834) 4 Tyr. 726.
(6) (1842) 4 Man. & G. 795.

indemnity for all expenses incurred in and about the execution of the trust: *Benett* v. *Wyndham* (1); *In re Raybould, Raybould* v. *Turner* (2); *National Provincial Bank of England* v. *Games* (3); *Farrer* v. *Lacy, Hartland & Co.* (4); *In re Leslie, Leslie* v. *French* (5); *Rees* v. *Metropolitan Board of Works.* (6) The whole deed of May 28, 1897, is merely a mortgage, and it is impossible to say that it is to be read as a mortgage with a covenant added. Expenses incurred under clause 33 of the deed of May 20, 1897, cannot be said to be money lent or advanced within the meaning of s. 88 of the Stamp Act, 1891. *Knight's Deep* v. *Inland Revenue Commissioners* (7) is in the appellant's favour. *Dickson* v. *Cass* (8) is overruled by *Frith* v. *Rotherham.* (9)

The deed of May 28, 1897, was not a collateral or auxiliary security, or a security by way of further assurance within the meaning of "Mortgage, Bond, Debenture, Covenant," sub-head (2.), in the First Schedule to the Stamp Act, 1891. It is true that if the present case had arisen before the Revenue Act, 1903, came into operation it would have been difficult to distinguish it from the decision in *British Oil and Cake Mills* v. *Inland Revenue Commissioners* (10), and it must be admitted that that decision appears to be an authority against the appellant. But it may be distinguished, upon the ground that in the present case there was no mortgage debt at the time of the execution of the deed of May 20, 1897. Until something was done under that deed it was in the nature of an escrow. Therefore the deed of May 28, 1897, could not be a collateral security. The deed of May 20, 1897, was not a security while no debt was in existence. In *British Oil and Cake Mills* v. *Inland Revenue Commissioners* (10) there was a mortgage from the beginning. The deed of May 28, 1897, was itself a primary security. The deeds of May 20 and 28, 1897, must be read together. They constituted one mortgage: *Gartsides* (*Brookside Brewery*) v. *Inland Revenue Commissioners.* (11)

(1) (1862) 4 D. F. & J. 259.
(2) [1900] 1 Ch. 199.
(3) (1886) 31 Ch. D. 582.
(4) (1885) 31 Ch. D. 42.
(5) (1883) 23 Ch. D. 552, at p. 560.
(6) (1880) 14 Ch. D. 372.
(7) [1900] 1 Q. B. 217.
(8) (1830) 1 B. & Ad. 343.
(9) (1846) 15 L. J. (Ex.) 133.
(10) [1903] 1 K. B 689.
(11) (1900) 82 L. T. 686.

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But even if the duty of 6*d.* per cent. would have been payable on the deed of May 28, 1897, before the Revenue Act, 1903, came into operation, the effect of s. 7 of that statute is to make the duty payable a sum not exceeding 10*s.* Sect. 7 of the Act of 1903 is a declaratory section, and it applies to any instrument which is in fact stamped after the Act came into force. The Revenue Act, 1903, came into operation on September 1, 1903, and any deed stamped after it came into force is subject to its provisions: *Attorney-General* v. *Marquis of Hertford.*(1) [*Rowell* v. *Inland Revenue Commissioners* (2), the Revenue Act, 1845, (8 & 9 Vict. c. 76), *Attorney-General* v. *Theobald* (3), and the Stamp Act, 1891, s. 15, were also referred to.]

Sir William Robson, *A.-G.*, and *W. Finlay*, for the Crown. Sect. 15 of the Stamp Act, 1891, requires a deed to be stamped within thirty days of execution. The deed of May 20, 1897, created a trust. In pursuance of that deed the company purchased on May 28, 1897. The two deeds are each necessary to the other. The first question is whether the security constituted by the deed of May 28, 1897, is for a limited or unlimited amount. Under the deed it is clear that there may be a considerable extension of the amount secured. It is impossible to treat the subject-matter of clause 33 in the deed of May 20, 1897, as an additional subject for taxation unless it is itself a mortgage. In order to constitute a mortgage there must be a charge or a covenant to repay, or at all events an obligation to repay and a security for that obligation. In *Doe d. Merceron* v. *Bragg* (4) there was no charge. In *Wroughton* v. *Turtle* (5) there was no covenant by the mortgagor to repay the mortgagee the expenses incurred by the latter. *Doe d. Scruton* v. *Snaith* (6) is distinguishable. Clause 33 of the deed of May 20, 1897, is just as complete a mortgage with regard to the cost of repairs as the deed is with regard to the 230,000*l.* If clause 33 had been the subject of a separate deed, it clearly would have been for an unlimited amount.

The provisions of the clause are materially different from the other parts of the deed—for example, the interest payable on

(1) (1849) 3 Ex. 670.
(2) [1897] 2 Q. B. 194.
(3) (1890) 24 Q. B. D. 557.
(4) 8 A. & E. 620.
(5) 11 M. & W. 561.
(6) 8 Bing. 146

sums expended on repairs is 5 per cent. per annum, instead of 4¼ per cent. per annum payable on the debenture stock. A further advance made under clause 33 is not repayable on six months' notice, nor at 10 per cent. premium, as the debenture stock is, and there are other differences. The clause in effect constitutes a separate deed, the provisions of which would not be found in an ordinary mortgage. It is quite true that where a mortgagee has power to do something which may of itself add something to his charge, but which does not alter the nature of the security, it would be unreasonable to construe the power as constituting a security for an indefinite sum. But a power of that kind is quite different from the power given by clause 33 of the indenture of May 20, 1897. If a security is given for a definite sum, the expression of what the law would imply does not alter the nature of the security: *Rowell* v. *Inland Revenue Commissioners* (1); *Doe d. Scruton* v. *Snaith.* (2) It is true that a provision for payment by the mortgagor of expenses inevitably incident to the security would not make the security one for an indefinite amount, but there is no term contained in clause 33 of the indenture of May 20, 1897, which is inevitably incident to a mortgage security. Where the security requires exceptional covenants it is no longer within the principle of the decision in *Doe d. Scruton* v. *Snaith.* (2) The principle is that, when an ordinary mortgage is being dealt with, the mere fact that terms are expressed which would be implied by law does not make any difference to the nature of the security. In the present case it is clear from the deed of May 20, 1897, that the parties must have contemplated a reasonable probability of further advances. In *Doe d. Merceron* v. *Bragg* (3) there was not a further advance, and the Court was dealing with a legal implication. If clauses which the law would not imply are found in a mortgage security, the principle of the decision in *Doe d. Scruton* v. *Snaith* (2) is not applicable. In *Wroughton* v. *Turtle* (4) there was no covenant on the part of the mortgagor that he would pay. In the present case it is possible that something may take place under clause 33 of the deed of May 20, 1897, which would be called a loan, advance,

(1) [1897] 2 Q. B. 194.
(2) 8 Bing. 146.
(3) 8 A. & E. 620.
(4) 11 M. & W. 561.

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or payment, and would therefore be subject to the provisions of s. 88 of the Stamp Act, 1891, and would not be merely incidental to the mortgage like the trustees' expenses. There is no term contained in clause 33 of the deed of May 20, 1897, which the Court would read into the deed of May 28, 1897. Any clause in a mortgage under which the parties may add to the security is a clause providing for a loan or further advance, not merely for an expense incidental to the security. *Frith* v. *Rotherham* (1) does not apply. Clause 33 of the deed of May 20, 1897, is not necessary for the maintenance of the security; it is in effect a separate deed, and constitutes a completely different security. It is exactly the security a mortgagor would have to give if he wished to obtain money from the public for the purposes mentioned in the clause, where there would be a separate loan under a collateral security. It is true that it was intended by clause 33 to make the trustees' security effectual, but immediately provision is made for a further advance the deed becomes a security for money without limit, and s. 12, sub-s. 6 (*b*), and s. 88 of the Stamp Act, 1891, apply. There is no hardship inflicted upon the parties by the operation of those sections, for if a further advance is made further stamp duty ought to be paid. The only disadvantage to the parties is that they cannot require the Commissioners to adjudicate upon the liability of the instrument to duty.

The deed of May 28, 1897, is a mortgage by way of further assurance, and is therefore chargeable with ad valorem duty under the head in the First Schedule to the Stamp Act, 1891, "Mortgage," &c., sub-head (2.), of 6*d*. per cent. on 223,200*l*., the amount of the debenture stock, if it is not a security for an unlimited amount. The deed of May 20, 1897, is the principal security. It constituted a security upon the uncalled capital, and it created a floating charge. Clause 8 created a principal charge. The property conveyed by the deed of May 28, 1897, is a collateral security for the charge.

With regard to the contention that the stamp duty is limited by the operation of s. 7 of the Revenue Act, 1903, the deed of May 28, 1897, ought to have been stamped in 1897, and the

(1) 15 L. J. (Ex.) 133.

appellant cannot by means of that default obtain the benefit of the provisions of the Revenue Act, 1903. That statute is not declaratory. It is clear from the provisions contained in s. 14, sub-s. 4, of the Stamp Act, 1891, that the deed must be stamped in accordance with the law as it was in force at the time when the deed was first executed. Where a statute is declaratory the language used is quite different from that of s. 7 of the Revenue Act, 1903—e.g., in s. 6 of the Finance Act, 1898, which is a declaratory section, the words "it is hereby declared" are used. [Coote on Mortgage and s. 86 of the Stamp Act, 1891, were also referred to.]

Whately, in reply. Sect. 7 of the Revenue Act, 1903, repeals s. 14, sub-s. 4, of the Stamp Act, 1891.

Cur. adv. vult.

Feb. 12. BRAY J. In this case the appellant and one Cooper, since deceased, applied to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, to express their opinion with reference to a deed dated May 28, 1897, and the Commissioners at first declined to adjudicate upon the liability of the deed to duty, on the ground that under sub-s. 6 (*b*) of s. 12 of the Act of 1891 they could not be required so to do. The language of the sub-section is, "Nothing in this section shall extend to any instrument chargeable with ad valorem duty, and made as a security for money or stock without limit . . . ."; and the Commissioners contended that, upon the true construction of the deed of May 28, 1897, it was "a security for money or stock without limit." They afterwards, however, without prejudice, did express their opinion as to the duty that was payable. They expressed the opinion that it was subject to a duty of 6*d.* per cent. upon 223,200*l.*, "the amount of the debenture stock issued as aforesaid." They assessed the total duty under the head in the First Schedule to the Stamp Act, 1891, "Mortgage, Bond, Debenture, Covenant," sub-head (2.), at 55*l.* 16*s.*

The appellant contended that the deed of May 28, 1897, was not a security for money without limit, and that the duty of 6*d.* per cent. was not payable; and that in any case, by virtue of

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s. 7 of the Revenue Act, 1903, if the duty had been at any time payable it was now limited to 10*s*.

I will first deal with the question whether the deed of May 28, 1897, was a security without limit. It is a point of some importance—first, because there may be many similar cases, and the Commissioners desire to have it decided; secondly, because in such cases as may happen—not, I think, in the present case—further duty may become payable under s. 88, sub-s. 2, of the Stamp Act, 1891, in respect of further advances. The contention on behalf of the Crown is that the deed of May 28, 1897, incorporated the provisions of a previous deed of May 20, 1897, and that the true effect of clause 33 of the latter deed is that it makes the deed of May 28, 1897, a security for money without limit, because it is constituted a security for certain sums that are payable, or may have to be paid, under clause 33 of the deed of May 20, 1897. Clause 33 is, therefore, the one I have to deal with. I do not think it is necessary for the purpose of construing it to read the rest of the clauses. There is no doubt that in the earlier part of the deed of May 20, 1897, the amount is limited to 230,000*l*., the amount to which the debenture stock was limited. I have to consider the effect of clause 33, which says: "The company will not during the continuance of this security pull down remove or destroy any buildings or erections or any fixed works machinery or plant for the time being subject to this security without the previous consent of the trustees except in any case where such pulling down removal or destruction shall be rendered necessary by such buildings erections works machinery or plant being out of repair injured or worn out and in that case will replace the same by others of a similar nature and of at least equal value And also will renew and replace all machinery tools implements utensils carts waggons and other effects at any time used for the purpose of or in connection with the business of the company when and as the same shall be worn out injured lost or destroyed and will at all times keep the said buildings erections works machinery plant tools utensils and effects in good repair and working condition." Stopping there, what is the object? It seems to me that up to that point it is a covenant by the company that, first, they will

not remove or destroy any buildings except in a specific case; secondly, that they will repair all the buildings; and, thirdly, that they will renew and replace all machinery, tools, implements, &c., which may become worn out, injured, lost, or destroyed. What is the object of that covenant? It seems to me the object is to enable the mortgagees to have the security maintained at its present value. That is the simple object of the covenant, and, if it is complied with by the company, it will have that effect.

The clause continues, "and will permit the trustees and such persons as they shall from time to time in writing for that purpose appoint to enter into and upon the lands buildings and works of the company to view the state and condition thereof and of all plant machinery implements and effects in or upon the same respectively." That provision is merely to enable the trustees (the mortgagees) to enter and see if the company are fulfilling their covenant so that it carries the matter no further. Then comes a provision about insurance, which I need not deal with, because it is specially dealt with by s. 88, sub-s. 3, of the Stamp Act, 1891.

The next words in the clause are those upon which principal reliance is laid by the Crown. They are, "and if default shall be made in keeping the mortgaged premises in a good state of repair and working condition and so insured as aforesaid the trustees may from time to time repair or renew or insure (as the case may require) the mortgaged premises or any part thereof and the company will on demand repay to the trustees every sum of money expended by them for the above purposes with interest at the rate of 5 per cent. per annum from the time of the same having been expended." What is the object of that provision? It seems to me that under the previous portions of the clause very difficult questions might have arisen as to damages. Undoubtedly under the early part of the clause, if there were a default or breach, the trustees could bring an action against the company for damages. But what damages would they recover? It could, at all events, be very plausibly contended that the only damages which could be recovered would be any injury to the security, and, if the property in repair was

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still sufficient security, I do not know—at all events, it is doubtful—whether it could not be said that the damages were merely nominal. It does not seem to me to follow that they would be the amount which would have to be expended in order to put the premises into repair. Again, if the mortgagees did recover that amount, I do not know that they would be bound to apply that sum in payment of the principal or interest. It might be plausibly argued, at all events, that they might put it into their own pockets. For these reasons the clause without the words I have last cited would leave both parties in a very unsatisfactory condition. The parties, therefore, very sensibly, as it seems to me, have come to an agreement as to what is to happen in case of default, and they have provided that in that case the trustees may themselves do the repairs, and the company are bound to repay the money so expended, with interest. That is perfectly fair. The company will only have to pay that which they ought to have expended in doing the repairs themselves. They will obtain the benefit of having the repairs done, and the mortgagees will not put any money into their own pockets. Therefore that seems to me a perfectly simple, reasonable, and proper way of providing a remedy in case of breach of the covenant, and the covenant, read as a whole up to that point, seems to me nothing more than a perfectly reasonable and proper one for the purpose of ensuring the security being maintained at its original value.

The clause continues, "and until such repayment the same shall be a charge upon the mortgaged premises." In my opinion those words do no more than would be implied without them, because I do not think that a Court of Equity would allow the company to redeem without repayment of any moneys the trustees might have expended for the purposes mentioned in the clause.

Is that expenditure money "lent, advanced, or paid" so as to make the deed of May 28, 1897, in respect of it "a security for the payment or repayment of money to be lent, advanced, or paid" within the meaning of s. 88 of the Stamp Act, 1891. First, as to the words "lent" or "advanced." Can these moneys which the trustees may expend in doing these repairs be properly said to be lent or advanced? In my opinion they cannot. These words must be construed somewhat strictly against the Crown,

because the Stamp Act, 1891, is a taxing Act. The words must certainly not be strained in any degree in favour of the Crown, and in my opinion it would be quite unreasonable to say that the parties intended, by the deed of May 20, 1897, containing clause 33, that these moneys expended by the trustees should be treated as a loan or advance. If this were a special provision, and one which was unreasonable and improper, the contention on behalf of the Crown that the real object of it was to enable the trustees to advance further moneys and to have a security for those advances might have been upheld; but when it is—as I have held it to be—merely such a reasonable and proper clause as ought to appear in every mortgage where the security is of this kind, it seems to me that clause 33 of the deed of May 20, 1897, cannot be construed as one enabling the trustees to lend or advance any further moneys. The word "paid" in s. 88 of the Stamp Act, 1891, perhaps creates a little more difficulty, but in sub-s. 2 of s. 88 the word "paid" (or "payment" as it would be) is omitted. Sub-s. 2 of s. 88 contains a provision as to what is to happen if further payments, loans, or advances (whatever they be) are made. The effect of it is that no further duty is to be paid unless there is a further advance or loan and the word "payment" is omitted. In my opinion the word "paid" carries the matter very little further than the words "lent" or "advanced," and the payment, in order to fall within s. 88 of the Stamp Act, 1891, must be a payment which is intended to be, and to work out as, an advance or loan. I do not know that there is any real difference between the words "lent" and "advanced," or that the addition of the word "advanced" adds anything to the word "lent"; and I also think the word "paid" adds very little. There may be some few cases which may be covered by these additional words which would not otherwise be included. In my opinion the payments which the trustees might have to make under clause 33 of the deed of May 20, 1897, would not be money "lent, advanced, or paid."

Several authorities were cited with reference to the Stamp Act, 1815 (55 Geo. 3, c. 184), which is not in all its clauses in the same words, but the language of s. 88 of the Stamp Act, 1891, is practically identical—"a security for the payment or repayment

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of money to be lent, advanced, or paid." I do not think that those authorities can be said to be exactly in point, but when carefully examined I think they all tend to confirm the opinion which I have formed. The first of them, *Dickson* v. *Cass* (1), I need not trouble about, because it has been expressly overruled. *Doe d. Scruton* v. *Snaith* (2) was a case where the mortgage contained a power to make leases, to sell, and to pay the expenses, and it was suggested that those expenses would in fact constitute a fresh advance. Park J. said: "Now, in this case, the sum named in the deed was not a security for the payment of any 'sum of money thereafter to be lent'; or 'uncertain in amount.' The true way to consider the question is, whether these expenses would not necessarily follow the power of lease and sale." In the same way it might be said in the present case that the expenses, perhaps not necessarily, but reasonably, follow the covenant by the company to repair and renew. He continues: "In a Court of Equity they would be considered incidental to the mortgage." As I read the covenant in the present case, I consider it, as I have already explained, incidental to the mortgage and simply what is reasonable, having regard to the nature of the security. Then Park J. adds, "and after the mortgagee shall have been reimbursed all expenses he may incur, the principal sum secured to him here is no more than 3000*l.*" The other judges follow on the same lines, and it seems to me that my decision in the present case is a very small extension—if it is an extension at all—of what is laid down there in *Doe d. Scruton* v. *Snaith*. (2) *Doe d. Merceron* v. *Bragg* (3) was a case where the mortgagor covenanted by the deed to pay all taxes, rates, or assessments on the premises, and the proviso for redemption was made subject to the performance of this covenant, so that in effect the mortgagee got a security in respect of any payments he might have to make. Lord Denman C.J. said: "The plaintiff was nonsuited for the insufficiency of the stamp"; and then he referred to *Doe d. Scruton* v. *Snaith* (2), and continued: "The objection was, that the mortgage deed was stamped only to the extent of the sum advanced, and did not cover the

(1) 1 B. & Ad. 343. (2) 8 Bing. 146.
(3) 8 A. & E. 620.

amount of taxes and rates which might be charged on the premises, and which the mortgagor covenanted to pay, and until payment of which the proviso for redemption was not to operate. This amount is truly said to be uncertain and without limit; and hence the 25*l.* stamp is argued to be necessary instead of the ad valorem stamp. The answer is that to the amount of these taxes and rates the mortgagee is, at all events, entitled; that he required no stipulation in respect of them; and that the stamp is regulated by the amount advanced or agreed to be advanced." It is true that that passage does not go the full length of covering the question with which I am dealing, because it says that what was expressed in the deed would be implied, so that it really was nothing more than a mortgage. But the judgment was based upon the principle that there was no independent covenant, and that it was what would reasonably follow from the mortgage itself. That is what I have held with regard to clause 33 of the deed of May 20, 1897. In *Wroughton* v. *Turtle* (1) there was a mortgage of a lease. Under the lease the lessor was bound to renew on payment of certain sums, and there was a covenant contained in the mortgage that the mortgagor should procure the renewal of the lease, and that, in case the mortgagor refused or neglected to do so, it should be lawful for the mortgagee to procure such renewal, and a covenant that all the fines, costs, and expenses of the mortgagee in procuring such renewals should be a charge on the mortgaged premises, and the same should not be redeemed or redeemable until payment of such costs. The distinction between that case and the present is that there there was no covenant by the mortgagor to repay these expenses either with or without interest. No doubt that was relied upon by Parke B. in his judgment. In construing the word "paid" he said that the payment must be restricted to one which would result in a debt, and that there was no debt in that case because there was no obligation by the mortgagor to pay or repay. It may be that that was a perfectly good distinction, and that it was all that was necessary for the purposes of the decision in that case, but I think it would be a very narrow view upon which

(1) 11 M. & W. 561.

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to construe s. 88 of the Stamp Act, 1891. In my opinion the word "payment" ought to be restricted still further and construed as meaning a payment which would in effect work out as an advance. In *Frith* v. *Rotherham* (1) the Court held that the commission was "money to be lent, advanced, or paid"; so that it clearly shews that those words, "lent, advanced, or paid," are necessary.

It was further contended on behalf of the Crown that if clause 33 of the deed of May 20, 1897, was not in itself a mortgage, just as if it had been a separate deed, there was, at all events, a covenant to pay contained in it, the amount being unlimited. Now, if the covenant were an independent one, there might be something in that contention, but, if it is only accessory to the mortgage itself, it seems to me that the matter is carried no further. I am of opinion that the deed of May 28, 1897, constitutes a mortgage and that there is no independent covenant, and that the deed must be assessed as a mortgage.

In the result, therefore, I hold that this deed was not a security without limit, and that it was the duty of the Commissioners to give their opinion as to the amount of duty payable.

I have now to deal with what is, perhaps, the more important point to the parties. The Commissioners have expressed the opinion that the deed of May 28, 1897, in addition to the stamp as a conveyance on sale, must be stamped as "being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped."

The first contention raised on behalf of the appellant is that the deed is not a further assurance where the principal or primary security is duly stamped. It was contended on behalf of the appellant that there was no primary security; that the deed of May 20, 1897, was not in fact a security because no money had been advanced.

I am of opinion that s. 88 of the Stamp Act, 1891, contemplates that the primary security may be a deed on which, at the moment it is executed, there has been no money lent or advanced.

(1) 15 L. J. (Ex.) 133.

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The deed of May 20, 1897, contains the words, "And whereas the company has determined to issue debenture stock to be constituted and secured in manner hereinafter provided." Clause 5 contains a provision that "The company will cause the hereditaments and properties described in the first schedule hereto to be forthwith conveyed to and vested in the trustees upon the trusts hereof free from incumbrances and will for that purpose execute and do all such assurances and things as the trustees may reasonably require." Clause 8 provides that "The company hereby charges in favour of the trustees all its property and assets for the time being (including its uncalled capital) with the payment of all moneys for the time being owing on the security of these presents. Such charge shall be a floating charge." Having regard to those provisions, I am of opinion that it was an existing security on May 20, 1897, as soon as it was executed. It was not necessary that any money should be advanced. The duty became payable at once, and the date when it ought to be stamped would be a date within thirty days from May 20, 1897, and not within thirty days from the first advance. I am therefore of opinion that the deed of May 20, 1897, was the primary security. The deed of May 28, 1897, was an instrument executed in pursuance of the express clause 5 of the deed of May 20, 1897, which says: "The company will cause the hereditaments and properties . . . . to be forthwith conveyed to and vested in the trustees upon the trusts hereof free from incumbrances and will for that purpose execute and do all such assurances and things as the trustees may reasonably require." In my opinion, if the matter stood as it would have done before the passing of the Revenue Act, 1903, the duty of 6*d.* per cent. would be payable.

There remains the further question whether under the Revenue Act, 1903, the duty which is now payable is 10*s.* only. The title of that statute is, "An Act to make certain amendments of the Law relating to Customs and Inland Revenue, and of the Law relating to the powers and duties of the National Debt Commissioners." After dealing with and altering certain duties, s. 7 provides that "The whole amount of duty payable under or by reference to paragraph (2.) of the heading

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'Mortgage, Bond, Debenture, Covenant and Warrant of Attorney' in the First Schedule to the Stamp Act, 1891, on any instrument being a collateral or auxiliary or additional or substituted security or by way of further assurance, shall not exceed ten shillings." On behalf of the appellant it was contended that that section applies to every duty, however long it may have been in default, if it has not been actually paid, and that therefore the section has a retrospective effect just as if it were a declaratory section—a declaration as to the meaning of the Stamp Act, 1891. In substance that contention is that the section is declaratory. In my opinion it is impossible to successfully contend that the Revenue Act, 1903, is a declaratory statute, or that it was the intention of the Legislature to declare that the true meaning of the head in the First Schedule to the Stamp Act, 1891, "Mortgage, Bond, Debenture, Covenant," sub-head (2.), is that the duty shall be only 10*s*. It is impossible so to contend successfully, having regard to the fact that the specific duty of 6*d*. per cent. is made payable. I am of opinion that s. 7 of the Revenue Act, 1903, is not declaratory, but that it makes an alteration in the law. The authorities shew sufficiently that, in order that a statute may have a retrospective effect, the words must be very clear.

It is therefore necessary to consider the language of the Revenue Act, 1903, and of the Stamp Act, 1891. Having regard to s. 14, sub-s. 4, and s. 15 of the Stamp Act, 1891, and to s. 7 of the Revenue Act, 1903, I am of opinion that s. 7 of the Act of 1903 is not retrospective. The deed was executed on May 28, 1897, and by virtue of s. 15 of the Stamp Act, 1891, thirty days after that date it could not be stamped without a penalty, consisting of a sum considerably over 10*l*., which would carry interest. That was the condition of things which remained up to the passing of the Revenue Act, 1903. The question raised is whether the words which appear in s. 7 of the Act of 1903 clearly shew that the provisions of s. 15 of the Act of 1891 were not to apply to a deed presented for the purpose of being stamped after the Act of 1903 came into operation. The language of s. 7 of the Revenue Act, 1903, is perfectly consistent with the meaning that the duty payable on

deeds included in it and executed after the commencement of the Act should henceforth be 10*s.*, and I think that is the natural meaning.

I am therefore of opinion that s. 7 of the Revenue Act, 1903, cannot be construed retrospectively; that the duty which is payable is that which was payable at the time of the execution of the deed, namely, 6*d.* per cent., which amounts to 55*l.* 10*s.* On that point, therefore, there must be judgment for the Crown.

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Judgment accordingly.

Solicitors for appellant: *Janson, Cobb, Pearson & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

J. E. A.

STEWART (SURVEYOR OF TAXES) *v.* CONSERVATORS OF RIVER THAMES.

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Feb. 11, 12.

Revenue—Income Tax—Exemption—Existing Tax—Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 289.

Sect. 289 of the Thames Conservancy Act, 1894, provides that, "notwithstanding anything in any Act," the properties therein mentioned shall be exempt from all parliamentary rates, taxes, and payments whatsoever.

The respondents, the conservators of the river Thames, claimed exemption under this section from the payment of income tax for the years 1905 and 1906 in respect of properties within the section.

The surveyor of taxes contended that, income tax being an annual tax, the income tax for the years 1905 and 1906 was not a tax existing at the date of the passing of the Thames Conservancy Act, 1894, and that the respondents were, therefore, not entitled to the exemption claimed:—

Held that, though income tax is in form an annual tax, the income tax payable in the years subsequent to 1894 must, for the purpose of the exemption, be deemed to be a tax which was existing at the date of the passing of the Thames Conservancy Act, 1894, and that the respondents were, therefore, entitled to the exemption claimed.

CASE stated for the opinion of the Court pursuant to s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

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At a meeting of the commissioners for the general purposes of the Income Tax Acts for the division of Abingdon, in the county of Berks, held at the Guildhall, Abingdon, on June 11, 1906, the conservators of the river Thames (hereinafter called the respondents) appealed against the assessments, set forth in the following table, made upon them under Scheds. A and B of the Income Tax Acts for the years ended April 5, 1905, and April 5, 1906, respectively:—

Number of Assessment and Parish.	Occupier.	Owner.	Description.	Gross.	Schedule A. Net Amount on which duty chargeable.	Schedule B. Net Amount on which duty chargeable.
				£ s.	£ s.	£ s.
165 Cumner.	Thames Conservancy	Same	House and Land, Locksall	5 0	4 0	—
165a do .	do.	do.	Land, Swinford	1 15	1 10	0 12
165b do.	do.	do.	Land, Cumner Meadow	3 0	2 14	1 0

At the hearing of the appeal the following facts were proved or admitted. Before the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), several statutes were passed relating to the navigation, &c., of the rivers Thames and Isis from the city of London to the town of Cricklade, in the county of Wiltshire.

By s. 1 of 24 Geo. 2, c. 8 (1751), intituled An Act for the better carrying on and regulating the navigation of the rivers Thames and Isis from the city of London westward to the town of Cricklade, in the county of Wilts, certain commissioners were appointed for putting the Act into execution.

By 11 Geo. 3, c. 45 (1770), s. 7, the said commissioners were empowered to purchase lands for making the necessary works and to make towing-paths, &c. Sect. 50 provided that nothing in the Act should prejudice the jurisdiction of the city of London, &c.

By 14 Geo. 3, c. 91 (1774), powers were given to the mayor, &c., of the city of London (inter alia) to improve the navigation, &c., of the river Thames between the city of London and the city stone above Staines Bridge, and so much of the statute

11 Geo. 3, c. 45, was repealed as vested the commissioners thereby appointed with any powers for improving, &c., the navigation of the river Thames between the city of London and the city stone above Staines Bridge.

By s. 2 of 28 Geo. 3, c. 51 (1788) (relating to the navigation of the rivers Thames and Isis between Staines and Cricklade), it was provided that all tolls, weirs, locks, pound-locks, turnpikes, towing-paths, gates, toll-houses, bridges, and erections should be vested in the commissioners above referred to. By s. 20 the said tolls, pound-locks, towing-paths, bridges, toll-houses, ferries, toll-gates, and other works on the said navigation, and also the said commissioners, were not to be liable to or charged or chargeable with any rates, taxes, assessments, or payments whatsoever, either parliamentary or parochial or otherwise howsoever, for or on account of the said navigation or the produce thereof, any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding.

By s. 13 of 54 Geo. 3, c. ccxxiii. (1814) (relating to the improvement of the navigation of the river Thames west of London Bridge within the liberties of the city of London), the mayor, &c., of the city of London were empowered to take certain tolls. By s. 19 it was provided that the tolls and all the towing-paths, lands, houses, buildings, locks, works, tenements, and hereditaments vested and to be vested in the said mayor and commonwealth and citizens and their successors for the purposes of the said navigation should be exempted from all parochial rates, charges, impositions, and assessments whatsoever, save and except as therein excepted.

By s. 2 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.) (relating to the conservation of so much of the river Thames as is between the city stone near Staines and Yenleete in the county of Kent), it was provided that there should be twelve conservators for carrying the Act into execution. By s. 50 all the estate of the corporation of London in the bed and soil and shores of the river Thames from Staines to Yantlett [*sic*], in the county of Kent, was vested in the conservators. By s. 135 all lands, &c., vested in the corporation of London were vested in the conservators. By the Thames Conservancy Act,

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1864 (27 & 28 Vict. c. 113), s. 5, six elective conservators were added.

The Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), recited (inter alia) that certain powers for the maintenance and improvement of the navigation of the Thames from Staines to Cricklade had been vested in commissioners (in this Act called the Upper Navigation Commissioners). By s. 3 five additional conservators of the river Thames were added. By s. 25 the locks, canals, works, toll-houses, real and personal property, powers, authorities, privileges, exemptions, rights of action and suit, and all other the rights and interests of the Upper Navigation Commissioners, were transferred to and vested in the conservators of the river Thames. By s. 26 the Upper River Navigation Acts (except as far as they were expressed to be varied or repealed) were to remain in full force. By s. 41 the Conservancy Acts were extended to the Upper Thames.

The statutes above named were repealed by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.). By s. 5 of this Act additional conservators were appointed. By s. 58 the estate of the conservators in the Thames before the passing of the Act was continued. Sect. 289 provided that, "notwithstanding anything in any Act and notwithstanding any custom to the contrary, all tolls which for the time being may be demanded and received by the conservators under this Act in respect of the Thames above London Bridge and all lands, buildings, locks, pounds, tow-paths, bridges, ferries, and works for the time being vested in the conservators in respect of the Thames above London Bridge shall be exempt from all parochial charges, rates, taxes, assessments, impositions, and payments whatsoever save as hereinafter in this section mentioned, and all such tolls, lands, buildings, locks, pounds, tow-paths, bridges, ferries, and works in respect of the Thames above the City Stone above Staines Bridge shall be also exempt from all parliamentary rates, taxes, assessments, and payments whatsoever; provided always that the conservators shall pay full compensation and satisfaction for all parochial taxes whatsoever in respect of such lands and tow-paths in respect of the Thames between London Bridge and the said City Stone which have been or

may be purchased or used by the conservators for the purposes of this Act and for which parochial taxes were paid at the passing of the Act of 1814 in such manner and to such amount only as actually were paid or would have been paid for such lands or tow-paths in case the same had not been so purchased or used, such compensation and satisfaction to be settled by a jury, if necessary, in the same manner as compensation may under the Lands Clauses Acts in case of dispute be settled by a jury."

The respondents were the conservators of the river Thames appointed under the provisions of the statutes above mentioned for the purpose of regulating the navigation of the river Thames and for the carrying out of other matters in connection with the said river, and for such purposes the respondents were authorized (inter alia) to construct and maintain all necessary locks, sluices, weirs, and toll-houses and watch-houses for the proper working and regulation of the navigation of the said river. All the properties set out in the case were vested in the respondents in respect of the Thames, and were occupied and used by them in pursuance of their powers and duties as conservators of the river Thames as aforesaid, and were situate above the City Stone above Staines Bridge, and had been regularly assessed to the duties of income tax in question both prior to and subsequent to the passing of the Thames Conservancy Act, 1894.

The respondents, upon the hearing of the said appeal, claimed exemption from payment of income tax under the provisions of s. 289 of the Thames Conservancy Act, 1894. The appellant contended (inter alia) that the respondents were rightly assessed to income tax, and that s. 289 of the Thames Conservancy Act, 1894, did not give them exemption, the expression "parliamentary taxes," &c., not including income tax; and further, that the Act, which was a consolidating one, created no new exemptions, but merely incorporated in s. 289 the exemptions contained in 28 Geo. 3, c. 51, and 54 Geo. 3, c. ccxxiii., and that under 28 Geo. 3, c. 51, no exemption was given in respect of income tax, as at that time there was no statute imposing income tax in force; and further, that the Act of 1894 was a private

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Act, and would not exempt from taxation imposed by subsequent legislation.

The commissioners, being of opinion that s. 289 of the Thames Conservancy Act, 1894, did create a specific exemption from the payment of income tax, and that, therefore, the respondents were not liable thereto, allowed the appeal and discharged the assessments, and the appellant having declared his dissatisfaction with the determination of the commissioners as being erroneous in point of law, and having required the commissioners by notice duly given to state a case for the opinion of the High Court thereon, this case was stated accordingly.

The question for the opinion of the Court was whether upon the above statement of facts the determination of the commissioners was correct in law.

Sir W. S. Robson, *A.-G.*, and *W. Finlay*, for the appellant. First, the Crown is not named in the Thames Conservancy Act, 1894, and is not bound by it; and the claim of the respondents to be exempt from payment of income tax is contrary to s. 213 of that Act, which saves the rights of the Crown by providing that nothing in the Act shall "extend to take away, prejudice, diminish, or alter any estate, right, title, interest, privilege, power, or authority vested in or enjoyed or exerciseable by Her Majesty, her heirs or successors." Secondly, the Act is a local and personal consolidating Act, and there is, therefore, a presumption that it was not intended to alter the law as contained in the previous statutes relating to the Thames Conservancy: Craies on Statute Law (Hardcastle on Statutory Law, 4th ed.), pp. 298, 299; Maxwell on the Interpretation of Statutes, 4th ed. p. 89; *Clarkson* v. *Musgrave* (1); *In re Budgett*. (2) The language of s. 289 as to exemption from parliamentary taxes must be given the same meaning as the similar language in s. 20 of the Act of 1788 (28 Geo. 3, c. 51), and, as the words parliamentary taxes in that section could not have included the income tax, there being no income tax in 1788, it follows that the words in s. 289 of the Act of 1894 must also be construed as not including income tax. A private Act which

(1) (1882) 9 Q. B. D. 386. (2) [1894] 2 Ch. 557.

confers powers or privileges is always construed strictly against the promoters: Maxwell on the Interpretation of Statutes, 4th ed. pp. 449, 450. Thirdly, where an Act creates an exemption from taxes it only applies to those taxes which were in existence at the time of the passing of the Act: *Sion College* v. *London Corporation* (1); and, therefore, assuming that s. 289 applies to the income tax, it only exempted the respondents from payment of the tax for the year 1894, and leaves them liable to the tax in subsequent years. The income tax is a tax which is imposed anew each year. The Income Tax Acts are not in substitution for, and have no logical or necessary connection with, the Income Tax Act of the previous year: *Perchard* v. *Heywood* (2); *In re School for Indigent Blind at Liverpool* (3); *Duncan* v. *Scottish North Eastern Ry. Co.* (4)

Bankes, K.C., and *C. B. Marriott*, for the respondents. It is not necessary that the Crown should be expressly named in the Act in order to be bound by it. Sect. 213 is not a general saving clause, and has reference solely to the lands of the Crown and to the rights of the Crown in the bed of the river Thames. The Thames Conservancy Act, 1894, is an amending as well as a consolidating Act. When the language of a private Act is perfectly clear there is no difference between the mode of construing a private Act and a public Act: *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (5), per Lord Esher M.R.; *Williams* v. *Permanent Trustee Co. of New South Wales* (6); *Mitchell* v. *Simpson.* (7) Sect. 289 of the Act of 1894 says in perfectly plain language that, "notwithstanding anything in any Act," there shall be, in the case of the properties specified, an exemption from all parliamentary taxes. The section is an re-enactment in different language of the provisions of sections in two earlier Acts dealing with different parts of the river, namely, s. 20 of the Act of 1788 and s. 19 of the Act of 1814, and the words "notwithstanding anything in any Act" mean any Act before 1894, and not any Act before 1814 and 1788.

(1) [1901] 1 K. B. 617.
(2) (1800) 8 T. R. 468.
(3) [1898] 2 Ch. 669.
(4) (1870) L. R. 2 H. L. Sc. 20.
(5) (1885) 15 Q. B. D. 597, at p. 603.
(6) [1906] A. C. 249.
(7) (1890) 25 Q. B. D. 183.

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With regard to the last point raised for the appellant, which is founded on *Sion College* v. *London Corporation* (1), that the exemption only applies to taxes which were existing in 1894, the income tax, though in form an annual tax, is in substance an existing tax. At p. lxv. of the Introduction to Dowell's Income Tax Laws it is stated that: "The tax is granted only for a year; but in order to ensure the collection in due time of any income tax to be granted for any year, the income tax code is kept in force so as to apply to any new tax granted. See Finance Act, 1907, s. 18 (2.)." Thus the income tax, though reimposed each year, and sometimes increased or reduced in amount, must be treated as an existing tax for the purpose of dealing with exemptions. From that point of view the income tax is very like the land tax, as to which Lord Kenyon in *Williams* v. *Pritchard* (2) said that, though the land tax is, strictly speaking, an annual statute, it was one of the ways and means for raising supplies every year, and had become part of the constant resources of the country; and he held, therefore, that the Land Tax Act of 27 Geo. 3 could not be taken to have repealed an exemption from the land tax contained in an Act of 7 Geo. 3. The same considerations apply equally to the Income Tax Acts. It is absurd to suppose that Parliament intended to exempt the respondents from the payment of income tax for the one year, 1894, and not for any subsequent years.

W. Finlay, in reply, referred to *River Wear Commissioners* v. *Adamson* (3), *Attorney-General* v. *Gas Light and Coke Co.* (4), and *Mersey Docks and Harbour Board* v. *Lucas* (5) on the question of the construction of local and personal Acts of Parliament.

BRAY J. This is an appeal from a decision of the Income Tax Commissioners, by which the conservators of the river Thames were held to be exempt from the payment of income tax for the years 1905 and 1906. The exemption is claimed under s. 289 of the Thames Conservancy Act, 1894. On behalf of the Crown three points have been raised in support of the appeal. In the

(1) [1901] 1 K. B. 617.
(2) (1790) 4 T. R. 2.
(3) (1877) 2 App. Cas. 743, at p. 766.
(4) (1902) 19 Times L. R. 12.
(5) (1883) 8 App. Cas. 891.

first place, it is said that there is in the Act of 1894 a saving clause, s. 213, which prevents s. 289 from having the effect claimed. Secondly, it is said that the Act of 1894 was a local and personal Act and a consolidating Act, and that it must therefore be taken not to have altered the law as it existed under previous statutes. Thirdly, it is said that, although the Act of 1894 might have the effect of exempting the conservators from income tax for the year 1894, it did not do so with regard to the income tax claimed in this case, because that particular income tax was imposed by an Act passed after the Act of 1894.

With regard to the first point, it is no doubt a general rule of construction of statutes that the Crown is not bound by a statute unless it is named; but the Crown need not be named expressly—it may be named by implication. If it is quite clear from the provisions of the statute in question that it was intended that the Crown should be bound, then the absence of any express mention of the Crown will not have the effect of preventing it from being bound. It seems to me that the language of s. 289 of this Act clearly imports that the Crown is to be affected, and, therefore, there is no necessity for the Crown to be expressly mentioned. But then there is the saving clause, s. 213, and, in reading that section, it must be remembered that this Act, amongst other matters, deals with the bed of the river Thames, in which the Crown has undoubted rights, and it was necessary to protect those rights. The only words in s. 213 which can be said to be applicable to the question which I am now considering are the very general words, "nor except so far as relates to the right of navigation . . . . shall anything in this Act extend to take away, prejudice, diminish, or alter any estate, right, title, interest, privilege, power, or authority vested in or enjoyed or exerciseable by Her Majesty, her heirs or successors." When s. 213 is read in conjunction with s. 289, it cannot, in my opinion, be said that the effect of s. 213 is to modify s. 289 so as to prevent the Crown from being bound by that section.

With regard to the second point, the Act of 1894 is a local and personal Act, and no doubt there are cases in which a special rule of construction has been applied to Acts of that sort. In *Altrincham Union Assessment Committee* v. *Cheshire Lines*

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Committee (1) Lord Esher M.R. said: "Now it is quite true that there is some difference between a private Act of Parliament and a public one, but the only difference which I am aware of is as to the strictness of the construction to be given to it, when there is any doubt as to the meaning. In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But when the construction is perfectly clear, there is no difference between the modes of construing a private Act and a public Act." Therefore, according to Lord Esher, a private Act must be construed strictly, and so as not to give the promoters any greater advantage than is clearly given by the language used. It must be remembered, however, that, although this is a private Act, it is not the ordinary case of promoters who are going to make a profit by means of the acquisition of parliamentary powers, for, as is stated in the preamble to the Thames Conservancy Act, 1857, the preservation and improvement of the navigation of the river Thames is a matter of great national importance. Therefore, although I have to look very carefully at the provisions of this Act to see whether they do give the exemption claimed by the respondents, I do not think that the fact that the Act is a local and personal Act is one which ought to have very great weight with me. I think there is more to be said for the contention that the Act of 1894 is a consolidating Act, and that s. 289 ought, therefore, to be construed as only exempting the respondents from taxes which were in existence when the Act of 1788 was passed, s. 20 of which contained somewhat similar provisions as to exemption from parliamentary taxes. The effect of an Act being a consolidating Act is that if the same words are found in the consolidating Act as were in the original Act, and if an interpretation has been placed on those words in the original Act,

(1) 15 Q. B. D. 597, at p. 602.

then the same interpretation must be placed on the words in the consolidating Act. The contention of the Crown is that the Act of 1894 was not intended to alter in any way the exemption from the payment of parliamentary taxes conferred on the predecessors of the respondents by s. 20 of the Act of 1788, and as there was no income tax in existence at that date, and the language of s. 20 of that Act could not therefore apply to income tax, it is said that the language of s. 289 of the Act of 1894 must also be construed as not exempting the respondents from income tax. But the Act of 1894 is stated in the preamble to be "An Act to amend the constitution of and consolidate, amend and extend the statutory powers of the conservators of the river Thames," and "to make further provision for the preservation and improvement of the said river." It does not profess, therefore, to be merely a consolidating Act. Again, looking at the words of s. 289, it appears plainly that it is not a mere reproduction of words existing in the previous statutes. The section has been entirely reconstructed. The conclusion which I have come to is that, though s. 289 does to a certain extent reproduce the provisions of the earlier Act, the Act of 1894 was not a mere consolidating Act, but was an amending Act also, and one which contains an enactment of the law. I have, therefore, to construe s. 289 as it stands, without reference to the earlier legislation, and I find in the section the perfectly plain words that, "notwithstanding anything in any Act," that is, in any Act before 1894, the conservators are to be exempt from (inter alia) all parliamentary taxes in respect of the properties specified in the section. In my opinion it is impossible to construe that section as limiting the exemption to taxes which were in existence when the Act of 1788 was passed. The second point, therefore, fails.

Lastly, it is said that s. 289 in any event only exempted the conservators from the payment of income tax in 1894, and that it did not apply to the income tax for any year subsequent to that. It is difficult to contend seriously that this was what was intended, but the point must be considered.

Now it has been laid down quite clearly that, where an Act of Parliament contains an exemption from all parliamentary rates

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and taxes, that means, in the absence of any special words, rates and taxes existing at the time when the Act in question was passed, and the exemption does not extend to any rates or taxes subsequently imposed. But it was decided in *Williams* v. *Pritchard* (1) that the land tax, though renewed annually, was nevertheless to be regarded for this purpose as an existing tax. In that case Lord Kenyon said: "So here, though (strictly speaking) the land tax is an annual statute, and the words of the Land Tax Act, which was passed in the twenty-seventh year of this reign, are general and sufficiently large to subject these lands to the payment of the tax in question; yet as the land tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the Legislature, in passing the 27 Geo. 3, could not intend to repeal the provisions of the 7 Geo. 3 which exempted these lands from the land tax." Now, of course, it does not necessarily follow that the same rule applies to the income tax, but, still, every one of the words used by Lord Kenyon applies equally to the income tax; and a reference to the provisions of the Finance Acts shews that the income tax is always treated in those Acts as a well-known existing tax, and that no alteration is made except with regard to the rate at which the tax is to be levied in each year. I am of opinion that, for the purpose of the exemption in s. 289, the income tax must be regarded as an existing tax just as the land tax was in *Williams* v. *Pritchard* (1), and, therefore, the expression "all parliamentary rates, taxes, &c." in s. 289 applies to the income tax, not only for the year 1894, but for subsequent years also.

For these reasons I give judgment for the respondents.

Judgment for the respondents.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *W. S. Bunting.*

(1) 4 T. R. 2.

F. O. R.

THOMPSON *v.* McKENZIE.

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Feb. 13.

Licensing Acts—Permitting Drunkenness—Lodger at Hotel—Arrival of Lodger in condition of Drunkenness—Admission of after closing Hours—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 13—*Licensing Act,* 1902 (2 *Edw.* 7, *c.* 28), *s.* 4.

Premises licensed for the sale of intoxicating liquors do not during the hours when they are closed to the public cease to be licensed premises for the purposes of s. 13 of the Licensing Act, 1872, even as regards lodgers upon the premises.

A guest arrived at an hotel after the closing hour and engaged a bedroom. At the time of his doing so he was drunk to the knowledge of the hotel manager. He was shortly afterwards found drunk upon the premises by a constable:—

Held that, as by s. 18 a licensed person may refuse to admit to and may turn out of the premises any person who is drunk, the hotel proprietor was liable to be convicted under s. 13 of permitting drunkenness upon his premises, he being unable under the circumstances to discharge the onus cast upon him by s. 4 of the Licensing Act, 1902, of shewing that he took all reasonable steps for preventing drunkenness upon the premises.

Case stated by the stipendiary magistrate for Cardiff.

The appellant, who is the holder of a licence for the sale of intoxicating liquors at premises situate in Cardiff known as Elliott's Family Hotel, was summoned under s. 13 of the Licensing Act, 1872 (1), for having on July 28, 1907, permitted drunkenness on his licensed premises.

At the hearing the following facts were proved or admitted:—At 11.20 p.m. on July 28, a Sunday, two police officers visited the appellant's licensed premises and found seven or eight men in the smoking-room. One of the men, William John Thomas,

(1) By s. 13 of the Licensing Act, 1872 (35 & 36 Vict. c. 94): "If any licensed person permits drunkenness or any violent quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty."

By s. 18: "Any licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken violent quarrelsome or disorderly, and any person whose presence on his premises would subject him to a penalty under this Act. Any such person who upon being requested in pursuance of this section by such licensed person or his agent or servant or any constable to quit such premises refuses or fails so to do, shall be liable to a penalty."

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was asleep in a chair. He was awakened and found to be drunk. Thomas was a person lodging in the house, he having engaged the bedroom earlier in the evening at 10.30 P.M. He was drunk when he entered the hotel at 10.30, and his condition of drunkenness was observed by the "boots" who booked the room, and by the appellant's manager who was in charge of the premises. The manager accepted Thomas as a lodger, and took no steps to eject him.

In the city of Cardiff premises licensed for the sale of intoxicating liquors by retail are required by law to be closed during the whole of Sunday, except as to bona fide travellers, persons lodging in the house, and private friends bona fide entertained by the licensed person at his own expense.

On the part of the appellant it was contended that he was not liable to be convicted of the offence charged, inasmuch as Thomas, at the time he was found drunk, was a lodger, and not in the hotel for the purpose of using it as licensed premises.

The magistrate held that, inasmuch as the appellant's manager admitted Thomas to the hotel knowing him to be drunk, and had accepted him as a lodger, although not bound to do so, the appellant had not discharged the onus cast upon him by s. 4 of the Licensing Act, 1902 (1), of proving that he and his servants had taken all reasonable steps for preventing drunkenness upon the premises, and he accordingly convicted the appellant subject to a case for the opinion of the Court.

John Sankey, for the appellant. As by the Sunday Closing (Wales) Act, 1881, licensed premises are closed during the whole of Sunday, Thomas both engaged his room and was found drunk at a time when the hotel was closed to the general public. But the group of sections of which s. 13 is one, and which is headed "Offences against Public Order," do not apply to licensed premises after they are closed, so far as regards persons

(1) By s. 4 of the Licensing Act, 1902 (2 Edw. 7, c. 28): "Where a licensed person is charged with permitting drunkenness on his premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises."

who have a right to be there, such as the licensed person or an inmate or a lodger in the house. As regards such persons, the premises after closing time lose their licensed character and become private premises. Thus the licensed person cannot be convicted under s. 12 of being found drunk on his own licensed premises: *Lester* v. *Torrens*. (1) And a lodger such as Thomas stands on the same footing in that respect as the licensed person. It is not disputed that a member of the public, who is not a lodger and who has consequently no right to be on the licensed premises after closing time, may be convicted of being found drunk in the house after it is closed. It was so decided in *Reg.* v. *Pelly*. (2) But the decision seems to have proceeded upon the ground that the defendant there was not an inmate or a lodger, and to involve the conclusion that if he had been he would not have been convicted. If, then, the premises are private premises as regards a lodger after closing time, the licensed person cannot be convicted of permitting him to be drunk there under s. 13. That a lodger stands in a different position from that of a member of the public is clear from the fact that by s. 10 of the Act of 1874 he may be served with liquor at any time.

Ivor Bowen, for the respondent. The appellant here did not discharge the onus of proof put upon him by s. 4 of the Licensing Act, 1902. The manager ought not to have admitted Thomas at all, as he knew that he was drunk at the time. And knowing that fact he was under no obligation to admit him. He was not bound to do so at common law. In *Rex* v. *Ivens* (3), where an innkeeper was indicted for refusing to receive a guest, Coleridge J., in summing up to the jury, said: "If a person came to an inn drunk, ... I am of opinion that the innkeeper is not bound to receive him." And now it is expressly provided by s. 18 of the Licensing Act, 1872, that he may refuse to admit any person who is drunk. Sect. 4 is perfectly general in its terms. It shifts on to the licensed person the onus of proving that he took all reasonable steps for preventing drunkenness as soon as it is proved that "any person" was drunk on the premises. There

(1) (1877) 2 Q. B. D. 403. (2) [1897] 2 Q. B. 33.
(3) (1835) 7 C. & P. 213.

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is no ground for limiting that term so as to exclude lodgers in the house after closing time.

Sankey in reply.

LORD ALVERSTONE C.J. In this case I have entertained considerable doubt, but, on the whole, I am of opinion that the conviction should be affirmed. The decision seems to depend upon the question whether the appellant was bound to admit Thomas to the hotel. If he was bound to admit him, the conviction could not be supported. Sect. 13 of the Act of 1872, under which he was summoned, provides that, "If any licensed person permits drunkenness . . . . on his premises," he shall be liable to a penalty. And s. 4 of the Act of 1902 says that, "Where a licensed person is charged with permitting drunkenness on his premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises." Here Thomas was found drunk in the hotel. He was drunk when he came. It has been decided that it is not necessary to constitute the offence of permitting drunkenness that the drunken person should have been served with any drink upon the premises: *Hope* v. *Warburton*. (1) But it is said that Thomas was a lodger, and that s. 13 does not apply to lodgers after the closing hour. In my opinion the fact of his being a lodger is immaterial. The language of s. 4 of the Act of 1902 is perfectly general. It speaks of "any person." It applies to any person, other than the licensed person himself, whose presence on the premises is due to the permission of the licensed person. It is true that it has been held in *Warden* v. *Tye* (2) that the licensed person cannot be convicted under s. 13 of permitting himself to be drunk on his premises, and in *Lester* v. *Torrens* (3) it was held that neither can he be convicted under s. 12 of being found drunk on his premises after the closing hour. Nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises

(1) [1892] 2 Q. B. 134. (2) (1877) 2 C. P. D. 74.
(3) 2 Q. B. D. 403.

under s. 12. This seems to be involved in the decision in *Reg.* v. *Pelly* (1), where it was held that a customer, not being an inmate or lodger, who is found drunk in an inn after the closing hour may be convicted under s. 12. But it is one thing to say that the drunken lodger cannot be convicted himself under s. 12, it is another thing to say that the licensed person cannot be convicted under s. 13 of permitting him to be on the premises. Premises do not cease to be licensed premises for the purposes of s. 13 merely because they are closed to the general public. That being so, the question remains whether the appellant, in admitting Thomas to the hotel in a drunken condition and allowing him to remain there, did not fail to take all reasonable steps for the prevention of drunkenness upon the premises. I think he did. For it was optional with the appellant whether he would admit him or not. By s. 18 of the Act of 1872, "Any licensed person may refuse to admit to . . . . the premises in respect of which his licence is granted any person who is drunken." It was the manager's duty to refuse to admit Thomas, and for his neglect of that duty the appellant was liable to be convicted.

A. T. LAWRENCE J. I am of the same opinion. The question is whether it was an offence under s. 13 to receive a drunken man as a lodger. Having regard to the language of s. 4 of the Act of 1902, and to the fact that the appellant was under no obligation to admit him, there is no way of avoiding the conclusion that it was an offence.

SUTTON J. The fact that the appellant had the power to refuse Thomas admission to the hotel, and neglected to exercise that power, seems conclusive evidence that he permitted drunkenness upon the premises.

Appeal dismissed.

Solicitors for appellant: *Windybank, Samuell & Lawrence, for Lewis, Morgan & Box, Cardiff.*

Solicitors for respondent: *Smith, Rundell & Dods, for J. L. Wheatley, Cardiff.*

(1) [1897] 2 Q. B. 33.

J. F. C.

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Jan. 14, 15, 16;
Feb. 28.

YANGTSZE INSURANCE ASSOCIATION *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

Insurance (Marine)—Warranty against Contraband of War—Contraband Persons—Breach of Warranty.

The transport of military officers of a belligerent State as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance.

Trial of action before Bigham J. without a jury.

The action was on a policy of reinsurance dated December 13, 1904, and underwritten by the defendants. The terms of the policy and the facts of the case, as stated by the judge in his judgment, were as follows:—

The plaintiffs underwrote a policy for 18,000*l.* on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. The policy contained a warranty "not to carry cargo other than kerosene oil," and the insurance was to cover "the risk of capture." The policy was made in Shanghai. The plaintiffs were anxious to reinsure part of the risk, and accordingly on October 28, 1904, they telegraphed from Shanghai to their London office to "reinsure 15,000*l.*, including war risk, warranted no contraband of war." The London office succeeded in getting a slip initialled by different underwriters, including the defendant company; but as there was an uncertainty as to the meaning of the warranty "no contraband of war," which affected the question of premiums, the London office telegraphed to the Shanghai office on October 29 as follows: "S.S. *Nigretia*.—Reinsurance has been effected as required. There is some doubt as to the meaning of 'warranted no contraband of war.' It is understood that cargo oil kerosene only you guaranteeing not contraband. It is of utmost importance or otherwise thirty guineas per cent." The meaning of this telegram was that the underwriters were uncertain whether the Japanese Courts might not regard kerosene as contraband, and they required the plaintiff company to guarantee that it was not contraband, intimating that in the absence of

such a guarantee the premium would be thirty guineas per cent. This telegram was answered by the Shanghai office on October 31 as follows: "S.S. *Nigretia*.—Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee. Steamer clears Vladivostock. Are you satisfied?" This telegram was shewn by the London office to the different underwriters, and was accepted as satisfactory. The slip, which up to this point had contained in this connection only the words "warranted no contraband," was then amended by adding to those words the further words, "On basis as per cable dated Oct. 31./04," and the signatories to the slip initialled the telegram so as to identify it. The defendant company underwrote 2000*l*. The premium was agreed at fifteen guineas per cent. Subsequently, namely, on December 13, 1904, the defendants issued their formal policy, on which the present action is brought. The policy, following the terms of the slip, contains the following provision: "Warranted no contraband of war on basis of cable dated 31 October 1904 copy of which attached hereto"; and pinned to the policy is a typed copy of the telegram. The policy further provides as follows: "Being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk."

At this time a state of war existed between Russia and Japan, and on December 19, 1904, while on the insured voyage to Vladivostock, the *Nigretia* was captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by the Japanese prize court. The circumstances under which she was condemned appear from the judgment of the prize court. This judgment finds that on December 16, 1904, two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that these two persons were Russian officers; but, on the other hand, the Court found that there was no proof

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that they were ignorant of the fact, and the Court held that the ship "must be confiscated as the vessel was actually engaged in transporting contraband persons." The plaintiffs paid or compounded on the original policy as for a total loss, and then brought this action on the reinsurance policy to be indemnified by the defendants.

J. A. Hamilton, *K.C.*, and *Maurice Hill*, for the defendants. The transport of the Russian officers on board the ship was a breach of the warranty. A warranty of "no contraband of war" is not to be read as confined to a warranty against "contraband goods of war"; it means a warranty that there shall be nothing on board the ship which will expose her to the risk of capture. Sir Robert Phillimore, in his work on International Law, vol. 3, pp. 403-4 (2nd ed.), dealing with the question "What is Contraband?" treats as one of the classes of contraband "the carrying of military persons in the employ of a belligerent, or being in any way engaged in his transport service." And with respect to the carriage of such military persons he says, at p. 459: "It has been most solemnly decided by the tribunals of international law, both in England and the United States of North America, that these are acts of hostility on the part of the neutral which subject the vehicle in which the persons are conveyed to confiscation at the hands of the belligerent." In Creasy's First Platform of International Law, at p. 631, it is said: "In cases where the neutral vessel's destination is hostile, there is a class of persons who are regarded as contraband of war, and liable to seizure by a belligerent if found on board of her. This class includes 'soldiers or sailors in the service of the enemy, and officers whether military or civil, sent out on the public service of the enemy at the public expense of the enemy.' The penalty for carrying such contraband persons is the confiscation of the vessel and of such part of her cargo as belongs to her owner." In Bluntschli's Droit International (French edition, by Lardy, 1870) a similar statement occurs. Sect. 815: "Le transport de troupes ou de chefs faisant partie des armées belligérantes, sur des navires neutres, est assimilé au transport de matériel de guerre et envisagé comme contrebande." So, too, in Calvo,

Le Droit International, bk. 4, s. 2796, it is said: "Le transport sur des navires neutres de militaires ou de marins engagés au service d'un belligérant est assimilé au transport de matériel de guerre et considéré comme contrebande. . . . Le navire neutre qui transporte des gens de guerre pour le compte d'un Etat belligérant se met évidemment au service de cet Etat; il perd dès lors entièrement son caractère de neutre, et le belligérant opposé est en droit de le traiter tout à fait en ennemi."

Scrutton, K.C., and *Leck*, for the plaintiffs. There was no breach of the warranty. A warranty in a policy must, like every other part of the contract, be construed according to the understanding of merchants, and it does not bind the assured beyond the commercial import of the words: Arnould's Marine Insurance, 7th ed. s. 637. And, according to the ordinary acceptation of the term, "contraband" includes only goods, and not persons. Bynkershoek, in Quæstionum Juris Publici, lib. 1, cap. x., under the subject of contraband, deals only with goods. In Westlake's International Law, Part 2, at p. 240, contraband of war is defined to be "those articles which belligerents prohibit neutrals from carrying to their enemies, not in connection with a blockade, but because they are regarded as being objectionable in themselves, either generally or in the particular circumstances of a war." In Hall's International Law, Part 4, the chapter headed "Contraband" (ch. 5) deals only with contraband goods, while the transport of persons in the service of a belligerent is dealt with in a separate chapter (ch. 6) under the head of "Analogues of Contraband." The writer points out that the two differ in several material particulars, amongst others in this, that the Admiralty Courts have never claimed jurisdiction to deal with contraband persons, which they would have done if persons could be treated as contraband. And at the end of chapter 6, dealing with the despatches that passed between Lord Russell and Mr. Seward in reference to the case of "*The Trent*," he says: "It is to be regretted that Lord Russell did not address himself to the refutation of the doctrine that persons can be contraband of war." Mr. Mountague Bernard in his "Neutrality of Great Britain during the American Civil War" says, at p. 224: "A neutral ship,

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conveying persons in the enemy's employment, whether military or civil, is not liable to condemnation as prize unless, on a consideration of all the circumstances, the Court come to the conclusion that she is serving the enemy as a transport, and so as to assist substantially, although not perhaps directly, his military operations. . . . . It is incorrect to speak of the conveyance of such persons as if it were the same thing as the conveyance of 'contraband of war,' or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different." Professor Holland in his "Naval Prize Law," in chapter 6, headed "Neutral Vessels—Contraband," treats only of contraband goods, while he treats of the carriage of military persons in the service of the enemy and the carriage of enemy's despatches in a separate chapter headed "Neutral Vessels—Acting in the Service of the Enemy." Similarly, in Oppenheim's International Law, Part 3, Neutrality, the carriage of persons and despatches for the enemy, though analogous to contraband, is treated as quite distinct from the carriage of contraband goods. So, too, in Phillips on Insurance, the subject of contraband goods is dealt with in ss. 271-285, and the employment of a neutral vessel in a service auxiliary to the hostile operations of a belligerent, as by carrying despatches, in another part of the work—in s. 825.

Hamilton, K.C., in reply. If the plaintiffs' contention is right, there is in the case of this particular policy no subject-matter to which the warranty can apply. For the only cargo was to be kerosene, and, having regard to the British consul's assurance, which was accepted by all parties, kerosene was not treated by the Japanese Government as contraband. And, though the policy covered the return voyage to Shanghai, the ship was to return in ballast. Therefore, whatever the ordinary meaning of the words "contraband of war" may be, in this particular warranty they cannot be regarded as confined to contraband goods.

Cur. adv. vult.

Feb. 28. BIGHAM J. read the following judgment:—This is an action brought on a policy of marine insurance effected by

the plaintiffs with the defendants, which contained a warranty "no contraband of war." The only question to be determined is whether the defendants have proved a breach of the warranty so as to relieve them from liability. [The learned judge then stated the facts as above set out, and proceeded as follows:—] The defendants say they are not liable, because there has been a breach of the warranty "no contraband of war on basis of cable dated 31 October, 1904"; and the question resolves itself into this: Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. "Contraband of war" is an expression which in ordinary language is used to describe certain classes of material, and does not cover human beings. Many text-writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to shew that they describe a class of contraband of war. The most recent text-writers treat persons as outside any accepted definition of contraband. The transport of "contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as, for instance, transmitting information to the enemy. It would in my opinion be wrong to say that, because the same results may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese Court carefully avoided describing these officers as contraband of war, and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the 5th edition of the late Mr. Hall's Treatise on International Law at p. 673, where he says: "With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the

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belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. . . . . When . . . . a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him." A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the *Trent* case, Mr. Hall points out that, whereas Admiralty Courts have power to try claims to contraband

goods, they have no power to try claims concerning contraband persons; and he adds: "To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them."

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I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Thomas Cooper & Co.*

J. F. C.

SIMPSON *v.* SOUTH OXFORDSHIRE WATER AND GAS COMPANY.

1908
Feb. 12;
March 2.

Waterworks—Neglect to furnish a Supply of Water for Domestic Purposes—Insufficiency of Supply—Penalty—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 43.

By s. 43 of the Waterworks Clauses Act, 1847, if a water company "neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water [*sic*] during any part of the time for which the rates for such supply have been paid or tendered," they are to be liable to a penalty:—

Held, that the above provision applies only to a total cessation of the supply, and not to a neglect to furnish a sufficient quantity. If the water company continuously supply the consumer with some water for his domestic purposes, the fact that the quantity supplied is insufficient for the reasonable requirements of his house does not constitute an offence within the section.

CASE stated by justices of Oxfordshire.

The appellant is the occupier of a house called The Temple, at

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Goring, in the county of Oxford, within the limits of supply of the respondent company. The house contains eighteen bedrooms, three bathrooms, eight water-closets, and a lavatory. It is occupied by the appellant and three members of his family and twelve servants, and he sometimes has as many as eight visitors staying at his house. There are in the house three cisterns, one a cold water cistern of a capacity of 150 gallons, the second a hot water cistern of the same capacity, and the third, which supplied the water-closets, being of the capacity of fifty gallons. For eleven years previously to April 15, 1907, the premises had been supplied by the predecessors of the respondents (the Goring and Streatley District Gas and Water Company) and by the respondents with water for domestic purposes through a communication pipe which was connected with the respondents' main. The pipe was of the diameter of one inch for a distance of 180 feet from the main, and from that point for a distance of 185 feet up to the point at which it entered the appellant's premises the pipe was of the diameter of one and a quarter inches. On April 15, 1907, the respondents, without the consent of the appellant, substituted for the said one inch and one and a quarter inch pipes a half inch pipe. This latter pipe only allowed the passage of three gallons of water per minute, as against seventeen gallons per minute theretofore passing through the larger pipes. In the case of the respondents' undertaking no limits for the bore of the communication pipe are prescribed by their special Act. In consequence of the substitution of the half inch pipe a sufficient quantity of water to supply the premises properly could not flow through the communication pipe. On June 12, 1907, the appellant gave notice in writing to the respondents of the insufficiency of the supply. Subsequently on Sunday, June 16, the cold water cistern was empty at 9 A.M., and was not full again until midday. There was ample pressure on the main, but the half inch communication pipe was incapable of supplying all the baths. The appellant, who had paid the rate for the two quarters ending June 24, laid an information against the respondents under s. 43 of the Waterworks Clauses Act, 1847, charging that they neglected on the said 16th day of June to furnish him with a supply of water. The justices

found that a cistern holding 100 or 150 gallons was one of reasonable capacity for a house of the size and accommodation of the appellant's house, there being no statutory obligation on the consumers supplied by the respondents to provide any cistern or water storage at all, and that a half inch communication pipe was not adequate for the proper and reasonable supply of the appellant's house; but they held that the respondents could not be lawfully convicted under s. 43 unless they neglected to furnish any supply of water at all to the appellant, and they accordingly dismissed the summons subject to a case for the opinion of the Court. (1)

Acland, K.C., and *Spokes*, for the appellant, having read the case, were stopped by the Court.

Cecil Walsh, for the respondents. Assuming that the supply

(1) By the Waterworks Clauses Act 1847, s. 35: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water rate for the same; and such supply shall be constantly laid on at such a pressure as will make the water reach the top story of the highest houses within the said limits, ..."

Sect. 43: "If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fireplugs, or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid, ... or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water [*sic*] during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

Sect. 50: "The bore of any such pipe as last aforesaid" (i.e., communication pipe laid by the consumer) "shall not exceed the prescribed limits, and where no limit shall be prescribed it shall not exceed half an inch, except with the consent of the undertakers."

Sect. 53: "Every owner and occupier of any dwelling house . . . . within the limits of the special Act shall, when he has . . . . paid or tendered the water rate payable in respect thereof . . . . be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

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furnished by the respondents was not "sufficient for" the appellant's "domestic purposes" within the meaning of s. 53 of the Waterworks Clauses Act, and therefore was less than he was entitled to, he has mistaken his remedy. He ought to have proceeded by action, not for a penalty under s. 43. That latter section provides for penalties in the case of four different breaches of duty by the undertakers—(1.) the neglect to maintain fireplugs; (2.) the neglect to furnish the town commissioners with a sufficient supply of water for public purposes; (3.) the neglect to keep their pipes charged at a proper pressure; and (4.) the neglect to furnish a private consumer with "a supply of water." Nothing is said under this last head as to the supply being sufficient—it is simply to be a supply; whereas under head No. 2, where water is to be furnished for public purposes, it is expressly made an offence if the supply is not "sufficient." The omission of the word from No. 4 was presumably intentional. "Inclusio unius exclusio alterius." The offence under head No. 4 is the total cessation of supply. This contention does not involve the absurdity of the undertakers being guilty of no offence if they continuously furnish a mere trickle of water. For they are liable to a penalty if they do not keep their pipes charged at the proper pressure, and it is open to the consumer under s. 50 to put in his own communication pipe with a bore of half an inch. Where both those conditions exist, as the justices have found was the case here, the quantity of water supplied must be substantial. The Legislature presumably did not intend the difficult question of the sufficiency of the quantity supplied to be decided on a summary proceeding for penalties where that proceeding was at the instance of a private consumer. That they did, however, so intend in the case of proceedings by the town commissioners may be explained by the necessity of putting a summary end to a condition of things involving grave public danger. It must be conceded that the respondents' contention is in conflict with a dictum of Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1), where he speaks of the breach of duty towards the consumer as a neglect to furnish him "with the

(1) (1877) 2 Ex. D. 441, at p. 446.

supply of water to which he is entitled," that is to say, a sufficient supply of water, to which he is declared to be entitled under s. 53. But that was a dictum which was unnecessary to the decision. There has been hitherto no reported case in which proceedings for a penalty have ever been taken for an insufficient as distinguished from an interrupted supply.

Acland, K.C., in reply. There is no distinction in s. 43 between a supply and a sufficient supply. A supply which is insufficient is not a supply at all. Sect. 43 is defectively drawn; it is hopelessly ungrammatical in that it contains no accusative to be governed by the verb "furnish." The offence is stated to be a neglect "to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water"; what they ought to furnish is not stated. Therefore clearly some words are to be read into the section, and the question is what words. Presumably what the undertakers are to furnish is what the consumer is entitled to receive. For that we must refer to s. 53, which says that the consumer who has paid the rate is entitled to demand and receive from the undertakers "a sufficient supply of water for his domestic purposes." Those are the words, then, which must be read into s. 43 to fill up the hiatus after the words "to receive a supply of water." And here admittedly the supply of water furnished to the appellant was not sufficient for those purposes. This was the view of the meaning of s. 43 taken by Lord Cairns in *Atkinson's Case*. (1) It may be that his dictum there was obiter, but it is a dictum of very high authority. It is suggested for the respondents that the proper remedy for an insufficient supply, as distinguished from an interrupted one, is an action. But that would be in such a case as the present impracticable. For what would be the measure of the damages? How could a jury assess the damage for the annoyance caused to the occupier by reason of his guests having to go without their baths? It was because of the impossibility of so doing that the Legislature fixed the figure at 40*s.* by way of liquidated damages.

Cur. adv. vult.

(1) 2 Ex. D. 441, at p. 446.

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March 2. The judgment of the Court (Lord Alverstone C.J., A. T. Lawrence and Sutton JJ.) was delivered by

LORD ALVERSTONE C.J. In this case the respondents were summoned under s. 43 of the Waterworks Clauses Act, 1847, for neglecting or refusing to furnish the appellant with a supply of water. The justices found as a fact that the respondents did neglect to furnish to the appellant for his premises a sufficient or reasonable supply of water for his domestic purposes. That finding makes it unnecessary for us to consider the circumstances under which the respondents substituted a half inch pipe for one of larger diameter, which substitution led to the shortness of supply. The only point we have to determine is whether the neglect to give a sufficient supply of pure water is an offence under s. 43.

It was contended on behalf of the respondents that the only offence in respect of which a water company is liable to a penalty under s. 43 in this respect is if there has been a complete interruption of the supply of water during some part of the time for which the rate has been paid or tendered, and that, inasmuch as the respondents did supply water at the rate of three gallons a minute during the whole time, the offence contemplated by s. 43 had not been committed, and that the appellant must pursue some other remedy.

The sections which bear upon the question are the following. By s. 35 the undertakers must provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district, who shall be entitled to demand a supply at such a pressure as will make the water reach the top storey of the highest house within the limits. Sect. 36 provides that if the undertakers twenty-eight days after demand refuse to provide such supply they shall forfeit to each of the owners the amount in the section specified. Sect. 53 entitles the owners to demand and receive a sufficient supply of water on payment or tender of the water rate. Sect. 43 apparently contemplates four offences: (1.) Neglect to fix, maintain and repair fireplugs; (2.) neglect to furnish to the town commissioners a sufficient supply of water for public purposes; (3.) neglect to keep the pipes charged under the

pressure specified in s. 35; (4.) neglect or refusal to furnish to a person entitled to receive a supply of water. The section is not grammatical as it stands, and requires the insertion of the word "it" or "such supply" after the word "receive." Mr. Acland contended that the supply of water contemplated by this section is the sufficient supply (s. 53) of pure and wholesome water (s. 35), and that any neglect of the company to give a sufficient supply constitutes an offence under this part of s. 43. The question is by no means free from difficulty, but upon the whole we are of opinion that the argument of the respondents is correct. The section being a penal section must be construed strictly, and in our judgment the offence here contemplated is the complete interruption of the supply, and the words "want of supply" at the end of the section do not mean want of sufficient supply. We think this view is supported by the absence of the word "sufficient," which word occurs in the earlier part of the section with reference to the supply to the town commissioners, and had it been intended to deal with the case of deficiency in quantity, or impurity, the language would have been different. Mr. Walsh for the respondents relied on certain expressions in *Jackson* v. *Farnham Water Co.* (1), *Sheffield Waterworks Co.* v. *Wilkinson* (2), and *Sheffield Waterworks Co.* v. *Carter*. (3) In our opinion, however, these cases do not give us much assistance, as the judges in these cases were clearly not considering the point which we have to decide. Mr. Acland, on the other hand, relied upon the judgment of Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4), in which case, dealing with the four classes of neglect, Lord Cairns spoke of the fourth as the neglect to furnish any owner or occupier with the supply of water to which he is entitled, and later on in the same page as the owner or occupier asking for and not getting their proper supply of water. This judgment was delivered in the Court of Appeal, and is of course binding on us, as well as being a judgment of very high authority. But the question we have to consider was neither raised nor argued in that case, and it seems to us that Lord Cairns was not putting any construction upon,

(1) (1887) 3 Times L. R. 632.
(2) (1879) 4 C. P. D. 410.
(3) (1882) 8 Q. B D. 632.
(4) 2 Ex. D. 441, at p. 446.

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or considering the exact nature of, that which he describes as the fourth class of neglect, and the question as to whether insufficiency of supply would create an offence under the section was not before him. In our judgment the failure to give a sufficient supply, which must involve an inquiry as to the reasonable requirements of a particular consumer, and in some cases evidence of matters which would not be within the knowledge of the water company, is not the class of breach of statutory duty which would ordinarily be punished by a penalty. If we were to hold that the judgment of Lord Cairns applied to this case, it would follow that no action could be maintained against the company for the neglect to give a sufficient supply of pure and wholesome water, which view is to a certain extent inconsistent with *Milnes* v. *Huddersfield Corporation.* (1) In our opinion the fourth offence in respect of which the penalty is inflicted under s. 43 is the interruption of supply, and not the neglect to supply a sufficient quantity. The appeal fails.

Appeal dismissed.

Solicitors for appellant: *Rooke & Sons, for Brain & Brain, Reading.*

Solicitors for respondents: *Scadding & Bodkin.*

(1) (1886) 11 App. Cas. 511.

J. F. C.

RUGBY PORTLAND CEMENT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

1907
Dec. 20.
1908
Feb. 10.

Mines—Compensation—Railway Company—Limestone required to be left unworked—3 Will. 4, *c. xxxvi., ss.* 55, 58—*Railways Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 20), *s.* 78.

Under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, a claimant is entitled to compensation in respect of minerals which the railway company requires to be left unworked, on the basis of the value of the property to him. In many cases this value is much larger than the market value, but when he claims some special value all the circumstances, including any which tend to reduce the value to him to the market value or to something very little above it, must be looked at.

A railway company gave two notices to treat under s. 55 of 3 Will. 4, c. xxxvi. (which for the purposes of his judgment was taken by Bray J. to be in the same terms as s. 78 of the Railways Clauses Consolidation Act, 1845), to the claimants, who were the owners in fee simple of land adjoining the railway and of limestone and minerals thereunder and under the railway, requiring them not to work the portions of the limestone and minerals mentioned in the two notices respectively. The claimants had erected a cement manufactory on their land, and were quarrying the limestone thereunder and manufacturing it into cement. The limestone including the stone the subject of the first notice to treat, called "the first notice stone," was near to but not under the railway, and the stone the subject of the second notice to treat, called "the second notice stone," was under the railway. The stone including that the subject of the notices, allowing for considerable increase in the claimants' business, was sufficient for the purposes of their cement manufactory for a period greatly exceeding twelve years from the date on which the notices to treat were given. The limestone not included in the notices to treat was equally convenient and accessible to the claimants as the first and second notice stone. The claimants in the ordinary and reasonable course of quarrying would, but for the notices to treat, have worked and used the first and second notice stone in their manufactory during a period of twelve years from the date of the notices, and would have made thereby considerable profits. By reason of the notices to treat and the fetter thereby attached to the first and second notice stone, the claimants, for the purposes of their business, had recourse to and worked the stone not fettered by the notices to treat, and were in a position to make the same profits thereout until it was exhausted as if they had been able to work the first and second notice stone. Other limestone than the claimants' could be purchased in the neighbourhood. Their business would not be substantially affected by compliance with the notices:—

Held that, in determining the compensation payable by the railway

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company in respect of the limestone they required to be left unworked, the fact that the claimants had large quantities of other stone equally convenient and accessible, and that in the ordinary course of working they would have sufficient stone for a large number of years, and that the loss of this stone would only affect them after a long period of years, ought to be taken into consideration, and that, taking into account those facts, the price the claimants would have to pay for other limestone plus any extra cost of carriage represented the special value of the stone to the claimants.

Held, further, that ss. 55 and 58 of 3 Will. 4, c. xxxvi., must be read together, and that their effect was that the claimants might get their minerals by any way other than by means of a shaft, pit, or quarry on the surface. They might let the surface down, but must only have under-ground workings, not above-ground workings.

AWARD stated by an arbitrator in the form of a special case.

The following statement of facts is, in substance, taken from the judgment of Bray J.:—The Rugby Portland Cement Company, called in the award the claimants, claimed a large sum from the London and North Western Railway Company for the purchase by the railway company of certain limestone and minerals specified in two notices to treat given by the railway company, dated May 28, 1895, and August 22, 1896. The members of the firm or company had changed since the dates of these notices to treat, but nothing turned upon this, and the notices to treat were considered as having been given to the claimants, and as if they had been the owners from 1894 onwards. This claim being disputed, it was agreed between the parties that the amount to be paid should be ascertained by the award of an arbitrator, instead of by the verdict of a jury, as provided by the Act, and, questions of law having been raised in the course of the arbitration, the arbitrator stated his award in the form of a special case. The material facts were as follow: In the year 1833 the London and Birmingham Railway Company, the predecessors in title of the London and North Western Railway Company, obtained an Act of Parliament, 3 Will. 4, c. xxxvi. (1), authorizing

(1) 3 Will. 4, c. xxxvi., s. 8: "And be it further enacted, that for the purposes and subject to the provisions and restrictions of this Act it shall be lawful for the said company, their agents and workmen, and all other persons by them authorized, and they are hereby empowered, to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same or of any part

them to make a railway from London to Birmingham, and to acquire lands for that purpose. Under the provisions of this Act they obtained land from the predecessors in title of the

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thereof, and to set out and appropriate, for the purposes of this Act, such parts thereof as they are by this Act empowered to take or use; . . . . and generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and other works by this Act authorized, they the said company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by the execution of all or any of the powers hereby granted; and this Act shall be sufficient to indemnify the said company, and all other persons, for what they or any of them shall do by virtue of the powers hereby granted; subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained."

Sect. 24: "And be it further enacted, that all corporations and other parties by this Act capacitated to sell and convey any lands, or to enfranchise lands of copyhold or customary tenure, or to release lands from rents and other incumbrances charged thereon, and the respective owners and occupiers of any lands through or upon which the said railway or other works hereby authorized are intended to be made, may agree to accept and receive, and may, subject to such restrictions as in this Act contained as to the payment thereof, accept and receive satisfaction for the value of such lands, or of the interest therein by them conveyed, and also compensation for any damage by them sustained by reason of the execution of any of the works by this Act authorized, and also by reason of the severing or dividing such lands, and also for and on account of any damage, loss, or inconvenience which may be sustained by such corporations or other parties, by reason of the execution of any of the powers of this Act, in such gross sums as shall be agreed upon between the said owners (including persons hereby capacitated as aforesaid) and occupiers respectively, and the said company; and in case the said company and such parties respectively shall not agree as to the amount or value of such purchase money, satisfaction, or compensation, the same respectively, or either of them, concerning which they do not so agree, shall be ascertained and settled by the verdict of a jury, if required, as hereinafter is directed."

Sect. 25: "And for settling all differences which may arise between the said company and the several owners and occupiers of or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted, be it further enacted, that if any corporation, trustee, or other person so interested or entitled, and capacitated to sell, agree, or convey as aforesaid, shall not agree with the said company as to the amount of

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claimants, all coal, ironstone, limestone, stone, slate, clay, or other mines or minerals being excepted under s. 54 from the purchase and conveyance of the lands. At some time previous

such purchase money or satisfaction, or other compensation as aforesaid, or if any of the parties entitled to receive such purchase money or satisfaction, or other compensation as aforesaid, shall refuse to accept such purchase money or satisfaction, or other compensation aforesaid, as shall be offered by the said company, and shall give notice thereof in writing to the said company within twenty-one days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, ... such jury shall enquire of and assess and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said company from any other person, and also the sum of money to be paid by way of satisfaction or compensation either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual or for any recurring damages, which shall have been so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company, and which cannot or will not be further obviated, removed, or repaired by them; which satisfaction or compensation for such damage or loss shall be enquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; . . . ."

Sect. 54: "And be it further enacted, That nothing in this Act contained shall extend to give to the said company any coal, ironstone, limestone, stone, slate, clay, or other mines (or minerals) under any lands purchased by the said company under the provisions of this Act, except only so much of such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals as may be necessary to be dug or carried away or used for the purposes of this Act; but all such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals not necessary to be so dug, carried away, or used as aforesaid shall be deemed to be excepted out of the purchase of such lands, and may, subject to the restrictions herein-after contained, be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said company, as if this Act had not been passed."

Sect. 55: "Provided always, and be it further enacted, That when and so often as the proprietor or lessee or tenant of any mines of coal, ironstone, limestone, stone, slate, clay, or other mines and minerals lying under the said railway and works or any of them, or within the distance of forty yards from such railway or works respectively, shall be desirous of working the same, then and in every such case such proprietor, lessee, or tenant shall give notice in writing to the said company under his hand of such intention, at least twenty-one days before he shall begin to work such mines, and upon the receipt of such notice it shall be lawful for the said company to inspect or cause

to 1894 the claimants had erected a cement manufactory on lands adjoining to the lands so acquired, and were quarrying the limestone thereunder and manufacturing it into cement. They were owners in fee simple of these lands and of the minerals thereunder, and also of the minerals which had been excepted

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such mines to be inspected, and to contract and agree with any such proprietor, lessee, or tenant for the purchase, and to purchase, any such mines, or any part thereof, the getting and working of which may appear likely to prejudice or damage the said railway or other works; and in case the said company and such proprietor, lessee, or tenant do not agree as to the amount or value of such mines, the same shall be ascertained and settled by the verdict of a jury as is herein-before directed with respect to the lands which may be taken for the purposes of this Act: Provided nevertheless, that in case the said company do not, before the expiration of such twenty-one days, declare their desire to purchase the said mines, and treat with such proprietor, lessee, or tenant for the same, then it shall be lawful for the proprietor, lessee, or tenant of such mines, and he is hereby authorized, to work and get such part of the said mines as lie under the said railway and other works, or within the distance aforesaid, without being liable to the said company for any damage that may be done thereby."

Sect. 58: "And be it further enacted, That from and after the passing of this Act no shaft, pit, or quarry shall be dug, sunk, or made in or on the said railway: Provided always, that it shall be lawful for any proprietor, lessee, or tenant of any mines or works on each side of the said railway, to fix all such ropes, chains, connection rods, and other matters as may be necessary for working the said mines, in conformity with the provisions of this Act, over, under, across, near, or by the said railway, provided that by so doing such proprietor, lessee, or tenant do not injure such railway, or interrupt in any manner the free passage upon or along the same."

Railways Clauses Consolidation Act, 1845, s. 78: "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

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from the purchase by the railway company from their predecessors. On November 10, 1894, they gave a notice or notices to the railway company under s. 55 that they intended to work certain limestone and minerals under and near the railway, and this led to the two notices to treat. The first notice related to stone near to but not under the railway, called in the award "the first notice stone," and the second to stone under the railway, called "the second notice stone."

It was agreed between the claimants and the railway company that, for the purposes of the award, November 1, 1895, should be deemed to be the date on which the first and second notices to treat were given.

By paragraphs 2 to 5 inclusive of this award the arbitrator found as follows: "(2.) The said limestone including the stone the subject of the first notice to treat hereinafter called 'the first notice stone,' and the stone the subject of the second notice to treat hereinafter called 'the second notice stone' allowing for considerable increase in the claimants' business was sufficient for the purposes of their cement manufactory for a period greatly exceeding twelve years from the first November, one thousand eight hundred and ninety-five. The limestone not included in the said notices to treat was equally convenient and accessible to the claimants as the said first notice stone and second notice stone. (3.) The claimants in the ordinary and reasonable course of quarrying would, but for the said notices to treat, have worked the first notice stone and second notice stone, and would have used it in their manufactory during a period of twelve years from the first November, one thousand eight hundred and ninety-five, and by the use thereof would have made considerable profits. (4.) By reason of the said notices to treat and the fetter thereby attached to the first notice stone and second notice stone, the claimants have for the purposes of their business had recourse to and have worked the stone not fettered by the said notices to treat, and have made and are in a position to make the same profits thereout until the same is exhausted as if they had been able to work the first notice stone and second notice stone. (5.) With respect to the said notice stone, I find as follows, that is to say: the claimants by entering upon their own property

could, and would have worked and gotten the said stone without going on to the surface of the railway, but the effect of so working and getting the stone would have been to cause the subsidence of the rails and ballast of the railway. If the claimants were under obligation to maintain the said rails and ballast undisturbed by the working and getting of the said stone the cost necessary to fulfil each obligation would have rendered the working of the said stone commercially impracticable." With regard to both sets of stone, the claimants contended before the arbitrator that the value of the stone to them, as the owners, was to be assessed on the basis of what they might fairly be expected to have made out of it by working it in the ordinary and reasonable manner in which it would have been worked but for the notices to treat. The railway company contended, with regard to both sets, (1.) that the value of the stone was the value if offered for sale on November 1, 1895, in the open market, the claimants being possible competitors therefor; (2.) that if it were held that the value of the stone should represent indemnity to the claimants for all loss to them consequential on the taking of the property, the arbitrator was entitled to take into account the fact that the profit which by ordinary and reasonable working would have been earned by the claimants by getting and using the first and second notice stone might for a long period of years be earned by their getting and using the other stone lying under their property. With regard to the second notice stone, the railway company further contended that the getting and working of the stone under the conditions prescribed would have been in contravention of s. 58 of 3 Will. 4, c. xxxvi. Having thus stated the contentions, the arbitrator proceeded to fix the values of the stone according to the different contentions, namely, 523*l.* and 896*l.* if the railway company's first or second contention were correct, and 6074*l.* and 9180*l.* if the claimants' contention were correct, and, in respect of the second notice stone, nothing at all if the railway company's last contention were correct.

Cripps, K.C., and *A. T. Lawrence*, for the claimants. The question as to what value ought to be assessed by the arbitrator in respect of the taking of the property is covered by the decision

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in *Eden* v. *North Eastern Ry. Co.* (1) In that case it was decided that the loss to the owner resulting from a pillar of coal being left under the notice by the railway company, excluding all other considerations, must be ascertained. The sum which the owner would have made if he had been allowed to work the coal has to be ascertained. That sum is the market price of the coal less the cost of getting it. That principle is applicable in the present case. Under the statute 3 Will. 4, c. xxxvi., the mines and minerals were not to be compensated for under the Railways Clauses Consolidation Act, 1845, but were to be taken under the terms of 3 Will. 4, c. xxxvi., and under that Act the matter is not one of compensation, but of purchase. The value of this property to the owner in the ordinary case of purchase has to be ascertained. The value to the owner must alone be regarded, and outside matters, for instance, other limestone the owner could quarry, must not be taken into consideration. That is the effect of the decision in *Eden* v. *North Eastern Ry. Co.* (1) The statute 3 Will. 4, c. xxxvi., is more favourable to the claimants than the Railways Clauses Consolidation Act, 1845, as the claimants have to be dealt with on the basis that the limestone is purchased, not that compensation merely is given. It is clear that where there is a purchase of land the property taken has to be considered, and if the owner reasonably worked it the question is what would he have made out of it, and from that sum has to be deducted the cost of getting the mineral. On that basis the sums of 6074*l.* and 9180*l.* are the amounts to which the arbitrator finds the claimants are entitled. In *Eden* v. *North Eastern Ry. Co.* (1) no doubt it was in substance suggested that, as it had been held in *Great Northern Ry. Co.* v. *Inland Revenue Commissioners* (2) that the sum to be paid to the owner was compensation for the embargo on working resulting from the notice to leave the minerals unworked, and not purchase-money, the principle that the full value to the owner must be allowed was open to question, but the suggestion was overruled.

Under 3 Will. 4, c. xxxvi., if the claimants' property is not taken they are to be entitled to work, or if it is taken, to have compensation, but in working they are not for the purpose of

(1) [1907] A. C. 400. (2) [1901] 1 K. B. 416.

sinking a shaft, pit, or quarry, or putting up any machinery, to interfere with the actual working of the line itself. They are not to go in or on the railway, and could not, for instance, place a barrier across the line which would prevent the railway from actually being worked. But there is nothing in the Act which interferes with their general right to be paid for their property when the railway company requires it for the purpose of subjacent and adjacent support. They are not entitled to go in or on the line for quarrying, and, so far as that makes the quarrying more expensive, allowance must be made against them; but subject to that limitation they are entitled to get their limestone, unless the railway company buys it. That that is the true principle is clear from the language of ss. 55 and 58 of 3 Will. 4, c. xxxvi.

Under these sections the claimants may work their limestone, although they cause damage to the railway company, provided they do not go upon the railway for the purpose and do not put up machinery or some obstruction which stops the railway company running their trains along the line. Under the Railways Clauses Consolidation Act, 1845, it was held that, if an owner is doing in the way of quarrying what he would ordinarily do but for the line of railway, he may enter and remove the ballast: *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (1) It was to protect the railway against a trespass of that kind that s. 58 of 3 Will. 4, c. xxxvi., was inserted, but it was not intended thereby to enable the railway company to obtain the claimants' property without paying for it, and on the principle laid down in *Eden* v. *North Eastern Ry. Co.* (2) the amount due to the claimants in respect of the second notice stone is 9180*l.* That is the value to the claimants of the limestone minus the cost of getting it. [*Midland Ry. Co.* v. *Miles* (3) was also referred to.]

Ernest Page, K.C., and *J. A. Tweedale*, for the respondents. The decision in *Eden* v. *North Eastern Ry. Co.* (2) is not in point. That case turned upon the construction of s. 78 of the Railways Clauses Consolidation Act, 1845. The provisions contained in that statute are quite different to those of 3 Will. 4, c. xxxvi. If the

(1) [1893] 1 Ch. 427. (2) [1907] A. C. 400.
(3) (1886) 33 Ch. D. 632.

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decision in *Eden* v. *North Eastern Ry. Co.* (1) is in point in any respect it is in favour of the respondents, because it shews that the question is what is the full value of the minerals required to be left unworked, and, in the present case, purchased. In other words, how much does the sum for which the minerals would have sold for if worked, less the cost of getting them, amount to? That amount has been found by the arbitrator to be 523*l.* in respect of the first notice stone, and that amount the respondents are willing to pay the claimants. It is the amount which the claimants would have made out of these particular tons of stone if they had raised them to the surface and sold them in the open market. That is the amount which is payable upon the principle of the decision in *Eden* v. *North Eastern Ry. Co.* (1), not the amount the claimants would have made by turning this particular stone into something altogether different. There is no authority for the proposition that, where an article of this kind is taken by virtue of a statute from its owner, the compensation, or damage, or purchase-money (or whatever the sum payable may be called) must be considered with regard not to the market value of the article when brought to the surface, but with regard to what the particular owner of it would have made out of it if he had carried on his manufacture. But, even if it be true that under the Railways Clauses Consolidation Act, 1845 (if that had been the governing statute), the claimants would have been able to recover the larger sum, they are certainly not entitled to recover it under 3 Will. 4, c. xxxvi., which is in fact the governing statute. Under ss. 78 and 79 of the Railways Clauses Act, 1845, compensation for the minerals the railway company require to be left unworked is payable to the owner. While the compensation may, and often does, result in a larger sum of money than could be given if the word "purchase" were used, it follows that when the word "purchase" is used in a statute the sum payable under it may be less than it would be if "compensation" were the word used. In order to ascertain the meaning of "compensation" it is necessary to refer to s. 6 of the Railways Clauses Consolidation Act, 1845. The decision in *Smith* v. *Great Western Ry. Co.* (2) shews that that section must be read with s. 78 of the Act of 1845, and

(1) [1907] A. C. 400. (2) (1877) 3 App. Cas. 165.

s. 6 provides that something more than mere purchase-money shall be paid if coal or mines of any kind are taken under s. 78. Therefore it may be that under the Railways Clauses Consolidation Act, 1845, if what is taken has some value special and peculiar to the owner, he may under s. 6 of that statute recover more than the market value of that particular property, namely, its value to him as distinguished from its value in the open market. That section contains the words "full compensation" and "all damage sustained," not "value" and "purchase," as in 3 Will. 4, c. xxxvi., s. 55. Where special value to an individual is to be taken into consideration, it is because in the particular statute the value to the particular owner is looked at, not the market value of the property taken.

In 3 Will. 4, c. xxxvi., when "full compensation" is meant it is mentioned, and so with the word "purchase." For instance, in s. 8 the words "full satisfaction" occur. In ss. 24, 25, 54, 55, and 76 the distinction between compensation and purchase is marked. The intention of the Legislature was that nothing in the way of compensation should be paid except where compensation is by the statute stated to be due. All that the claimants are now entitled to is the purchase value of the limestone, i.e., its value in the open market when it comes to the surface less the cost of getting it: *Attorney-General* v. *Tomline* (1); *Ashby's Staines Brewery Co., In re the Hand and Spear, Woking.* (2)

The claimants cannot work the second notice stone without quarrying within the meaning of s. 58 of 3 Will. 4, c. xxxvi. Therefore nothing is due to them in respect of the notice not to work this stone. The meaning of s. 58 is that no shaft shall be dug, no pit shall be sunk, and no quarry shall be made. The claimants cannot get the second notice stone without quarrying in the railway. That would be in contravention of s. 58 of 3 Will. 4, c. xxxvi. It would therefore have been impossible for them to work that limestone, and nothing is due to them in respect of it. Under s. 8 of 3 Will. 4, c. xxxvi., they receive "full satisfaction." This includes any loss they may suffer by reason of not being able to quarry. They are, therefore, now only entitled to the purchase-money for the limestone,

(1) (1877) 5 Ch. D. 750. (2) [1906] 2 K. B. 754.

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because all compensation to which they were entitled was included in the amount paid on the conveyance of the land to the railway company. [*London and North Western Ry. Co.* v. *Walker* (1) and *Jary* v. *Barnsley Corporation* (2) were also referred to.]

Cripps, K.C., in reply. Sect. 8 of 3 Will. 4, c. xxxvi., is in substance identical with s. 6 of the Railways Clauses Consolidation Act, 1845, except that it contains the word "satisfaction" instead of "compensation." Under s. 6 of the Railways Clauses Consolidation Act, 1845, the railway company does not by purchasing land for the railway obtain the right of support for the railway. Nor do the respondents in the present case, except to the extent that the claimants must not withdraw the support by trespassing so as to act in contravention of s. 58 of 3 Will. 4, c. xxxvi.

1908. Feb. 10. The following judgment was read by

BRAY J., who, after stating the facts, continued:—I will now consider the contentions on both sides, and, having regard to the statement in paragraph 3 of the award, and the admissions of counsel in argument before me, I think I must take the claimants' contention to be that they were entitled to all the profits they would have made if they had worked the stone in question, manufactured it into cement, and sold it as cement, after allowing for all expenses of working and manufacture and other proper deductions. It has been decided by the House of Lords, in an earlier stage of these proceedings, that the purchase of the railway company must be treated as a purchase under s. 55 of the Act of 1833 (3 Will. 4, c. xxxvi.), and that the provisions of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, do not apply, and it was contended on behalf of the railway company that the provisions of the Act of 1833 were much more favourable to them than those of the other Acts, which treated it as a matter for compensation, and not as a question of purchase-money. It may be that in some cases this might be so, the word "purchase" being used in s. 55 of 3 Will. 4, c. xxxvi., and the word "compensation" in s. 78 of the Railways Clauses

(1) [1900] A. C. 109; [1903] A. C. 289. (2) [1907] 2 Ch. 600.

Consolidation Act, 1845, but I think for the purpose of this case I may take the provisions of the former Act as the same as those of the other Acts. The claimants, if it were a case of purchase, would be entitled to the value of the minerals to them, and if they get the full value of the minerals to them they will in this case get full compensation. I shall not at all events be doing any wrong to the claimants if I apply to this case the law which has been laid down with reference to cases arising under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. The case of *Eden* v. *North Eastern Ry. Co.* (1) seems to come nearest to the present, and it was relied upon by counsel on each side as an authority in their favour. It certainly lays down the principle that the railway company are bound to pay in any case the full fee simple value of the minerals, and nothing less, notwithstanding any special relations that may happen to exist between lessor and lessee, but, as I read that case, the claimants there did not contend that the coal had any special value to them, and the House of Lords had not to consider whether the special position of the lessee might not have been a fit and proper element for consideration, if they had been claiming that the minerals had a special value to them beyond what it would have to others, and I do not think that case is an authority one way or the other upon the points that are really in controversy here. I think there is no doubt that under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, a claimant is entitled to claim compensation on the basis of the value of the property *to him*, and that in many cases this value is much larger than what may be called the market value; but I have always considered it as settled that when he does claim some special value all the circumstances of the case must be looked at, including any circumstances which tend to reduce the value to him to market value or to something very little above it. It is quite a common case that a claimant whose place of business is being taken should claim not only the market value of the business premises, but compensation for the loss of or injury to his business, in the shape of a year or more's

(1) [1907] A. C. 400.

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profit of the business, because the premises have a special value to him on account of the business carried on there. In such a case you have to look at all the circumstances to see what this loss is. If equally good premises cannot be obtained in the same street, or in an equally good street, it may be that the value of his business will be destroyed, and one has known as much as three years' profit given in addition to the market value of the premises, whereas if the premises next door are equally convenient and can be obtained at the market value or rent he will only receive in addition to the market value of his premises some small sum as compensation for the cost and inconvenience of removal. And the same result will follow if the claimant happens to be already the owner of vacant premises close by which are convenient and available for his use. The reason of this is plain. The fact of other suitable premises being available greatly diminishes his loss, which is only another way of stating that the special value to him of the premises is little more than the market value. He can get equally good premises for little more than the market value.

Now are these principles applicable here? Why should they not be? I think they are, and I am strongly confirmed in this opinion by the case of *Bidder* v. *North Staffordshire Ry. Co.* (1) In that case the Court of Appeal had to consider whether the arbitrator had the power to take into consideration the fact that the claimants were lessees of other lands which gave them a right of way the use of which would have the effect of diminishing their loss. The Court held that he had that power, and Lord Bramwell in giving judgment gave the illustration which I have given of a business house being taken and there being other houses to be had in the same street, in which case, if the business could be transferred without loss of goodwill, no compensation, he said, ought to be given for goodwill, and he added that if the claimants were seised in fee of both properties there could not be a doubt of the matter. Now, if these principles are applicable here, the arbitrator would be right in taking into consideration the fact that the claimants had large quantities of other stone equally convenient

(1) (1878) 4 Q. B. D. 412.

and accessible, and that in the ordinary course of working they would have sufficient stone for a large number of years, and that the loss of this stone would only affect them after a long period of years. The arbitrator has found, first, that the two sums of 523*l.* and 896*l.* represent at least the full market value of the two sets of stone. This complies with the rule laid down in *Eden's Case.* (1) Secondly, he has found that these sums are sufficient to indemnify the claimants if he is allowed to take into account the facts I have mentioned above; or, in other words, taking into account these facts, these sums represent the special value of the stone to the claimants. In my opinion the claimants are entitled to no more than these sums. The same result, I think, can be arrived at by considering the contention of the claimants. It is to be observed that they are claiming more than ten times the market value, and, as the arbitrator has found, ten times their actual loss under the circumstances which exist. Can this be maintained? Now it is clear that they cannot recover more than it will cost them to replace the stone taken. The arbitrator finds that they can replace this stone by other stone out of the large quantity they have at hand in the rest of the quarry without any additional expense. What is the value of this other stone? Is it to be said that the whole of it is worth ten times the market value, and, if not, why is this particular stone which happens to be taken worth ten times the market value? I can understand that it would have a somewhat greater value to the claimants than to the ordinary buyer, because it was near at hand and carriage would be saved. If they had to buy a quarry from a neighbouring proprietor they might be willing to give, and might have to give, a little higher price, but under the contention of the railway company the arbitrator would be entitled to give this extra value. I gather from the arbitrator's finding and from what was stated in argument that this was a limestone district where there were other cement manufactories, and where limestone had a market value, that is, a value at which it could be purchased or sold. Why should the limestone owned by the claimants have ten times the value of other limestone? If

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no other limestone could be purchased in the neighbourhood, then the claimants' limestone would be so much the more valuable to them, but, if there is limestone to be purchased, how can it be worth more to them than the price they would have to pay for other limestone plus any extra cost of carriage? The truth is that the claimants are including in their claim the profit made in their cement business, which the arbitrator finds has not been and will not be affected. If their business were injured or destroyed, as it would be if only a little or no more limestone could be bought, then this loss would form part of the value of the stone to them, but the fact that their business has not been and will not be substantially affected shews that the stone has not this very special value claimed. The contention of the claimants fails because they are claiming for a loss which they have not suffered. It is as if a claimant who had his business premises taken where he was making 1000*l.* a year profit, but who had removed to equally good premises in the same street, were claiming not only for the value of his old premises and any extra rent he had to pay for the new ones, but also for the 1000*l.* a year profit which he had been making at his old premises. The award, therefore, in respect of the first notice stone must stand at 523*l.*

As regards the second notice stone, I have to consider the further contention of the railway company, based on s. 58 of the Act of 1833 (3 Will. 4, c. xxxvi.). The concluding words of s. 55 plainly indicate that the Act of 1833 contemplated that the working of the stone might damage the railway and works of the company, but it expressly provided that the owners of the minerals might work them notwithstanding and without being liable for any such damage, and s. 58 must be read with this section. It prohibits the digging, sinking, or making of any shaft, pit, or quarry on the railway. Reading the two sections together, the Act provides that the owner may get his minerals by any way other than by means of a shaft, pit, or quarry on the surface. The claimants may let the surface down, but they must only have under-ground workings, not above-ground workings. Now, as I read the arbitrator's finding, he has found that the limestone included in the second notice can be obtained by other

than above-ground workings. If so, I think there is nothing to prevent the claimants from getting this stone, although the result may be that they will let down the surface on which the railway (including in the term "railway" the embankment) rests. In my opinion, therefore, this contention of the railway company fails, and the award in respect of the second notice stone must stand at 896*l.*

Judgment accordingly.

Solicitors for claimants: *Whitfield & Harrison.*
Solicitor for respondents: *C. de J. Andrewes.*

J. E. A.

In re MYERS.
Ex parte MYERS.

1908
Jan. 27, 28; *Feb.* 3, 4, 5.

Bankruptcy—Sham Sale by Debtor—Part Payment of Purchase-money—Right of Proof by Purchaser for Money actually paid.

The owner of a business, who had procured A. to become surety for the payment of a debt, and for that purpose to join him in making certain promissory notes, upon the eve of his bankruptcy entered into an agreement with A. for the sale to him of his business and stock-in-trade. By the terms of the agreement A., by way of part payment of the purchase-money, took over the sole liability upon the notes. Subsequently the vendor was adjudicated bankrupt, and the trustee in bankruptcy obtained a judgment declaring that the agreement and sale were a sham and void. A., who in the meantime had paid the notes, then put forward a proof against the debtor's estate for the money so paid as in respect of a consideration which had failed:—

Held, upon the authority of *In re Cross*, (1848) 4 De G. & Sm. 364, n., and *Ex parte Phillips*, (1888) 36 W. R. 567, that, although the debtor's estate had had the benefit of the payment, A. could not prove for it, as it had been paid in the course of carrying out a transaction devised in fraud of the general body of creditors; that so much of the fraudulent agreement as was disadvantageous to A., and precluded him from having recourse to the debtor as the principal maker of the notes, was binding on him, though the part which was advantageous to him did not bind the other creditors.

APPEAL from Wandsworth County Court.

In March, 1905, G. C. Hawkey, who carried on the business of

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MYERS, *In re.* MYERS, *Ex parte.*

a furniture dealer at 34, High Street, Clapham, became bankrupt, and John Baker was appointed trustee in the bankruptcy. Baker sold the business, with the lease of the premises and the stock-in-trade, to Joseph Myers for the price of 1000*l.*, which was to be paid in four instalments secured by four promissory notes of 250*l.* each due respectively on June 30, September 30, and December 30, 1905, and March 30, 1906. As he required Joseph Myers to find security for the due payment of the notes, Joseph procured his brother Abel Myers to become surety, and to join in making the notes. The sale was completed, and Joseph Myers entered into possession and carried on the business. He also bought a large amount of additional stock on credit. On June 30 the first of the four notes fell due and was paid by Joseph. In the month of August, 1905, his brother Abel was informed that Joseph was in pecuniary difficulties, and, being uneasy about his liability upon the three remaining notes, he proposed to Joseph that he should sell the business to him, which Joseph agreed to do. Accordingly an agreement was drawn up by Joseph's solicitor, dated August 17, 1905, whereby Joseph agreed to sell, and Abel agreed to purchase, the leasehold premises at 34, High Street, the goodwill of the business, the stock-in-trade, the household furniture, the fixtures, and the book debts. The purchase price was to be 150*l.* for the lease, goodwill, and fixtures, the book debts, stock-in-trade, and household furniture being taken at a valuation. The purchase price was to be paid as to 750*l.* on the signing of the agreement, another 750*l.* by the purchaser assuming the sole responsibility for the three promissory notes, and the balance in two instalments. The stock-in-trade and household furniture were valued at 1736*l.* 11*s.* 1*d.*, and the book debts at 16*l.* 15*s.* 6*d.* On the same date Abel Myers signed the agreement, and, according to his own account, paid 750*l.* to Joseph in cash. On August 23 a petition in bankruptcy was presented against Joseph, and Abel was informed of that fact, and on the same day a bill of sale of the furniture and stock-in-trade at 34, High Street was executed by Joseph to Abel, who in his evidence stated that he thereupon paid the whole of the balance of the purchase-money to Joseph in gold. On September 30 the first of the three notes

fell due and was paid by Abel. On October 10 Joseph Myers was adjudicated bankrupt, and John Baker was appointed trustee. On December 5 Baker brought an action against Abel Myers claiming a declaration that the agreement dated August 17 and the bill of sale dated August 23 were a fraud and a sham, and that the property comprised in the agreement and bill of sale formed part of the estate of Joseph Myers, the bankrupt. On July 5, 1906, on the action coming on for hearing, Abel Myers consented to judgment in the terms of the claim. In the meantime Abel had paid the two remaining promissory notes of 250*l.* each on December 30, 1905, and March 30, 1906. He subsequently alleged that the consent to judgment in the action against him had been given by mistake, and he put in a proof against the estate of Joseph Myers for the amount of the purchase price of the business which had purported to be sold by Joseph, including the 750*l.* paid upon the promissory notes. The trustee in bankruptcy rejected the proof, and on appeal the deputy judge of Wandsworth County Court affirmed the rejection, and held that Abel was not entitled to prove even for the 750*l.* paid upon the notes. Abel Myers appealed to the Divisional Court.

Arthur Powell, K.C., and *A. J. David*, for the appellant. The appellant is at all events entitled to prove for the 750*l.* which he paid upon the notes. Upon the assignment of the business and stock-in-trade being declared void, the consideration for the release of Joseph from his obligation to indemnify Abel against the payment of the notes wholly failed, and the right to an indemnity revived. *In re Gomersall* (1) supports the appellant's case. There one Jones bought for 200*l.* bills for 1727*l.* accepted by the debtors on the eve of their bankruptcy, Jones having full knowledge that the bills were fraudulent on the acceptors' creditors and were sham bills. Yet, in spite of his being guilty of fraud in purchasing the sham bills, he was held entitled to prove for the 200*l.* which he had paid, whereas, if the trustee's contention here is right, he ought not to have been allowed to prove at all.

Low, K.C., and *Tindale Davis*, for the trustee. A person who

(1) (1875) 1 Ch. D. 137.

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has been an active participator in a fraudulent transaction, in the course of which he releases a debt, upon the transaction being set aside cannot be remitted to his original rights so as to entitle him to say that the debt still subsists. In *Ex parte Oliver* (1), where a creditor signed a composition deed containing a release of the debtor subject to a proviso making the release void on non-payment of the instalments, and at the same time secretly stipulated for a preference over the other creditors, he was held to be bound by the release notwithstanding that the instalments were not paid. So, too, in *In re Cross* (2) it was held upon similar facts that the fraudulent creditor was bound by the release so as to preclude him from suing out a fiat against the debtor upon the original debt. And these decisions were afterwards approved by the Court of Appeal in *Ex parte Phillips*. (3) If it were otherwise, a person could embark upon a fraudulent transaction of this kind without running any risk of punishment in the event of the fraud being found out. *In re Gomersall* (4) is distinguishable, for there the Court apparently drew a distinction between the purchaser of the bills having notice of the fraud of the bankrupts and being an active participator in it himself. Baggallay L.J. said (5): "I must confess that it appeared to me that Jones should be treated as having had complicity in a fraudulent transaction, and should not be allowed to prove at all. But as it appears to the Lords Justices that he should be allowed to prove for the sum of 200*l*., my doubts are not so strong upon the point as to induce me to express a contrary opinion."

A. J. David in reply.

BIGHAM J., having reviewed the evidence and expressed his concurrence with the deputy county court judge that the whole transaction with respect to the sale of the business was a sham devised in fraud of the general body of Joseph's creditors, proceeded as follows:—I think this proof cannot stand. It is true that Abel has paid 750*l*. to retire the promissory notes. I do

(1) (1851) 4 De G. & Sm. 354.
(2) 4 De G. & Sm. 364, n.
(3) 36 W. R. 567.
(4) 1 Ch. D. 137.
(5) 1 Ch. D. at p. 147.

not believe that he ever paid anything more, but if he did the observations that I am about to make will equally apply to such further payment. Abel Myers parted with his money as part of a fraudulent scheme and in order to enable him to carry out the fraud. It was one of the means by which he hoped to secure the fruits of that fraud. However, the fraud was discovered, and he was obliged to disgorge the fruits of it. He then says, Give me back the money that I actually paid and of which the debtor's estate has had the benefit. I answer, He shall not have it. Money which is paid for the purpose of perfecting a fraud on creditors cannot be the subject of a proof against the debtor's estate. Abel Myers, by paying it, bought the chance of the fraud working out to his profit. In the result it has not done so. Under those circumstances the Court will not allow him to turn round and claim a right to prove. This conclusion is not unsupported by authority. In the cases which were referred to in argument—*Ex parte Oliver* (1), *In re Cross* (2), and *Ex parte Phillips* (3)—it was held that a creditor who executed a composition deed, upon the face of which he was to be paid pari passu with the other creditors, and at the same time secretly stipulated for a preference, upon discovery of the fraud was not entitled to prove even for his undoubted original debt, which by the terms of the composition deed he had released. The reason of this is that, if a man will enter into a transaction of this kind, it binds him so far as it is to his disadvantage though it does not bind the other creditors. In *Ex parte Phillips* (3) Lord Halsbury, referring to *Ex parte Oliver* (1), said: "It is clear that that decision rests on a sound basis of law. In Sheppard's Touchstone, p. 132, speaking of illegal conditions, it is said, 'If the condition be subsequent to the estate, the condition only is void, and the estate good and absolute.' The effect of the present transaction is this: I release the debt you owe me provided you pay me that which will be a larger proportion of what you ought to pay than any other creditor will get. Such a condition is tainted with illegality, and it can make no difference that, instead of being expressed in the deed, it was come to by a secret arrangement.

(1) 4 De G. & Sm. 354. (2) 4 De G. & Sm. 364, n.
(3) 36 W. R. 567.

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Bigham J.

The result is that the release of the debt remains absolute, and the condition, which creates a fraudulent preference, is void." And Lord Esher in the same case said: "This case comes within the authorities which have been cited, and I agree with what was said in the case of *In re Cross* (1), reported in a note to *Ex parte Oliver* (2): 'It is a universal rule that a fraudulent deed, though operative against the fraudulent party to it, is not operative for him, and therefore confers on him no rights whatever.' This deed is not void, the release remains absolute. But the condition, being a fraudulent condition made with the intention of deceiving all the other creditors, is void, and the fraudulent party has lost both his original debt and the composition." The principle of those cases applies to the present. Abel is bound by his agreement to take upon himself the sole liability in respect of the promissory notes and to release Joseph from his obligation to indemnify him in respect of them. The appeal must be dismissed.

SUTTON J. I agree, both as to the finding of facts and also as to the principle of law applicable to them.

Appeal dismissed.

Solicitors for appellant: *Warmington & Co.*
Solicitors for trustee: *Raphael & Co.*

(1) 4 De G. & Sm. 364, n. (2) 4 De G. & Sm. 354.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1908
March 13.

MANSELL *v.* GRIFFIN.

Assault—Schoolmaster—Assistant Teacher—Public Elementary School—Corporal Punishment—School Regulations—County Court—New Trial.

APPEAL from the judgment of a Divisional Court (Phillimore J. and Walton J.), reported ante, p. 160.

The action was brought in the county court by a girl who had been a pupil in a public elementary school, through her father, as next friend, against an assistant mistress in the school, for assault.

The jury having found certain findings in answer to questions left to them by the county court judge, upon the application of the plaintiff the judge ordered a new trial on the ground that the jury was biassed, and also that one of their findings was against the weight of the evidence. The defendant appealed against this order, on the ground (inter alia) that there was no evidence of bias on the part of the jury.

The Divisional Court, being of opinion that there was no evidence of bias on the part of the jury, referred the case back to the county court judge that he might consider whether he would grant a new trial on the ground that the verdict of the jury was against the weight of the evidence, taking that ground by itself. See the report of the case in the Court below. (1)

The plaintiff appealed against the order of the Divisional Court.

H. M. Sturges, for the plaintiff.

H. Lynn, for the defendant.

THE COURT (Lord Alverstone C.J., Farwell L.J., and Kennedy L.J.) dismissed the appeal, and, under the circumstances, did not think it necessary to express any opinion on the question of law with regard to the authority of an assistant teacher in a public elementary school to inflict corporal punishment on a

(1) Ante, pp. 164, 168, 169.

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pupil otherwise than in accordance with the school regulations, which had been dealt with in the Court below.

Appeal dismissed.

Solicitors for plaintiff: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

Solicitors for defendant: *Baker & Nairne.*

E. L.

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March 13.

[IN THE COURT OF APPEAL.]

SMITH'S DOCK COMPANY, LIMITED *v.* TYNEMOUTH CORPORATION.

Rates—General District Rate—Occupation of Land—"Land covered with Water"—Pontoons floating over excavated Ground—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

The appellants (1), a dock company, were the owners and occupiers of certain hereditaments on the north-west bank of the river Tyne. Part of the hereditaments consisted of a yard with buildings used for building and repairing ships. The appellants excavated a certain space of ground alongside of their yard which before the excavation was dry land belonging to them. After the excavation the water of the Tyne flowed at all states of the tide over the excavated ground. The appellants constructed two pontoons which were used by them in their business of repairing ships. The most important part of the appellants' business was done by means of the pontoons. The pontoons floated over the excavated ground, each pontoon being kept in position by iron arms or booms working up and down on hinges as the tide rose or fell. The arms were arranged in pairs one above another, and were attached at one end to the pontoon and at the other to piles driven into the excavated ground; but the pontoons could be detached from the piles, and might have been kept in position by means of chains instead of the iron arms: —

Held (affirming the decision of a Divisional Court)—(1.) that the appellants were in occupation of the excavated land so as to be rateable in respect of it, inasmuch as they were in occupation of the land before and during the excavation, and afterwards the most important part of their business was done over the site; (2.) that the excavated

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(1) The terms "appellants" and "respondents" are used throughout this report with reference to the relation of the parties at quarter sessions.

ground over which the pontoons floated was "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

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SMITH'S DOCK COMPANY, LIMITED v. TYNEMOUTH CORPORATION.

APPEAL from the judgment of a Divisional Court (Channell J., Bray J., and Sutton J.) upon a case stated by a Court of quarter sessions for the county of Northumberland on an appeal against a general district rate. (1)

In a general district rate made by the respondents, the Tynemouth Corporation, on April 23, 1906, the appellants, Smith's Dock Company, Limited, were rated at the sum of 4700*l.* as the rateable value of certain hereditaments belonging to and occupied by them on the north-west bank of the river Tyne, and described in the rate as "Pontoons, dock, land, buildings, &c." The sum of 4700*l.* was the full net annual value of the hereditaments ascertained by the valuation list for the purposes of poor rate in force at the date of the general district rate.

The appellants appealed to quarter sessions against the rate, on the ground that they were therein rated upon the full net annual value of the whole of the hereditaments, and contended that they should have been rated in respect of part of the hereditaments in the proportion of one-fourth part only of such net annual value under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, on the ground that the part of the hereditaments consisted of "land covered with water" within the meaning of that section. For the purpose of the appeal the appellants admitted that the sum of 4700*l.* was correctly entered in the list and rate as the full net annual value of the whole of the hereditaments.

The hereditaments included a shipbuilding yard, with buildings containing machinery for building and repairing ships.

The space occupied by the pontoons was at one time dry land, the property of the appellants or their predecessors in title. The pontoons (two in number) were constructed in order to take ships which were too big to be admitted into the appellants' dry dock. The ground under the pontoons and a certain space behind them alongside the appellants' shipbuilding yard had been excavated by the appellants, and the water of the river Tyne now flowed at all states of the tide over the ground so excavated.

(1) Ante, p. 315.

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Each of the pontoons was constructed of iron plates, like those used in an iron-built ship, and was used for repairing ships in the following manner : The ship which required to be painted or repaired was brought over the water of the Tyne alongside of the pontoon, which was then submerged by letting water into the chambers of which it was constructed. The ship was then floated over the submerged pontoon, and the water in the pontoon was pumped out, and the pontoon by its own buoyancy rose and lifted the ship high and dry out of the water. In some cases where the ship to be repaired was longer than the pontoon on which it was placed, part of the decking had been removed at each end of the pontoon so as to make room for such ship.

Each of the pontoons was kept in position by iron arms or booms, working up and down on hinges as the tide rose or fell. The arms were arranged in pairs one above another; they were attached at one end to the pontoon and at the other to piles driven into the ground which was excavated and dredged out as above described. Wooden decking, which could be removed as occasion required, was fixed upon the piles, thus forming a false jetty.

Notwithstanding the connection by means of the iron arms, the pontoons could be detached from the piles to which they were attached, and they had in fact been detached and taken away from the places where they ordinarily floated, whenever it had been necessary to paint or repair the pontoons or to dredge the mud which collected underneath them. The pontoons could (if it were thought convenient) be kept in position by means of chains instead of the iron arms, and in other cases similar pontoons were in fact so kept in position by means of chains.

One of the pontoons was pumped out by means of a steam engine, to which steam was conveyed through a pipe attached to one of the iron arms. The other pontoon was pumped out by an engine driven by electricity conveyed by a cable attached to one of the iron arms. Both the engines could have been worked by means of power generated on board the pontoons, without any connection with boilers or plant on land for generating steam or electricity. On some of the iron arms a gangway was fixed to enable workmen to pass from the land to the pontoons, and vice versa.

The pontoons were always afloat. The tide had a rise and fall of about fifteen feet at ordinary spring tides, and at low water at ordinary spring tides there was a depth of about 3 ft. 6 in. of water underneath the pontoons. There was a margin of water a few feet wide round the pontoons exposed to the upper air and sky.

When it was necessary to take any machinery out of a ship resting on one of the pontoons for the purpose of repairing such machinery it was taken into one of the buildings containing machinery for building and repairing ships. About 80 per cent. of the business done by the appellants in the hereditaments was done on or in connection with ships which were carried on the pontoons in the manner hereinbefore described.

The appellants contended that the land which had been excavated, and over which the pontoons floated, was "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875 (1), and that they should have been assessed in respect thereof in the proportion of one-fourth only of the net annual value in the manner provided by the section.

The respondents contended that no part of the hereditaments ought to be rated as "land covered with water" under the section; that the pontoons were in fact, and ought to be, rated as part of the premises forming the shipbuilding or repairing yard, or as machinery or appliances attached and ancillary to the use of the yard and enhancing its value as a rateable hereditament.

The respondents admitted that they had rated the pontoons in accordance with the last-mentioned contention. If, contrary to the respondents' contention, the pontoons ought to have been rated as enhancing the value of that part of the land which had been excavated, the respondents admitted that the assessment could not be supported, and that the part of the hereditaments ought to be rated at one-fourth part only of the net annual value thereof. (2)

(1) Public Health Act, 1875, s. 211, sub-s. 1 (*b*): "The occupier of any . . . . land covered with water . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

(2) It will be seen from the report of the case in the Court below that, notwithstanding these admissions,

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It was agreed between the appellants and respondents that, if part of the hereditaments ought to be rated at one-fourth part only of the net annual value, the net annual value of that part was 3300*l.*, and that the rate should be upon one-fourth part thereof; and that the rate should be upon the full net annual value of 1400*l.*, being the residue of the sum of 4700*l.*, which is the net annual value of the whole of the hereditaments.

The Court of quarter sessions decided that the contention of the respondents was right in law, and dismissed the appeal with costs.

If the Court should be of opinion that the decision of the Court of quarter sessions was correct, the decision was to stand. If the Court should be of opinion that the contention of the appellants was correct, then the rate was to be amended in accordance with the agreement between the appellants and respondents above referred to.

The Divisional Court gave judgment for the appellants.

The respondents appealed.

Sir R. B. Finlay, K.C., and *Macmorran, K.C.* (*E. Shortt* with them), for the respondents. The hereditaments occupied by the appellants must be treated as a whole, and the value of the yard and other parts of the hereditaments on the land side of the pontoons ought to be considered as enhanced to the extent of the value attributable to the presence of the pontoons attached thereto. The excavated land would be of no value taken by itself. The premises as a whole derive the benefit accruing from the pontoons: *Forrest* v. *Greenwich Overseers* (1); *Reg.* v. *Morrison*. (2) But, assuming that there is a rateable occupation by the appellants of the excavated land over which the pontoons float, and they must be treated as a part of it, then the question arises whether that land can be considered as "land covered with water" within the meaning of the Public Health Act, 1875, s. 211, sub-s. 1 (*b*). It is submitted that it cannot,

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the Court thought that the case necessarily raised the question whether the excavated land was "land covered with water" within the meaning of the Public Health Act, 1875, s. 211, sub-s. 1 (*b*).

(1) (1858) 8 E. & B. 890.

(2) (1852) 1 E. & B. 150.

inasmuch as it is covered over by substantial permanent structures in the nature of fixtures, such as these pontoons. Such things as these cannot be treated as analogous to floating chattels, like ships and barges. What s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, contemplates is water open to the sky, as in a lake, or reservoir, or dock, not water roofed in by permanent structures: see *East London Waterworks Co.* v. *Leyton Sewer Authority* (1); *Reg.* v. *Newport Dock Co.* (2) If a portion of the bed of a river were roofed in by a permanent building in order to make part of a shipbuilding shed, or a swimming-bath, it would not be land covered with water within the meaning of the sub-section.

Walter Ryde (*E. M. Konstam* with him), for the appellants. The only question which really arises on the facts of this case is whether the excavated land, over which the pontoons float, is land covered with water within the meaning of the sub-section. It is clear from the authorities that, where a portion of a rated hereditament comes within the terms of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, the occupier is entitled to be rated at one-fourth only of the net annual value as to that portion. The appellants beyond all question occupy the excavated land, and the pontoons are machinery forming for rating purposes adjuncts to that land. If that land were situated in a different parish from that in which the rest of the hereditaments occupied by the appellants were situated, the parish in which it was would be entitled to rate the land as enhanced in value by the presence of the pontoons. This land is "land covered with water" within the meaning of the sub-section. The cases shew that artificial structures, such as reservoirs and docks, come within the sub-section: *Reg.* v. *Newport Dock Co.* (2); *East London Waterworks Co.* v. *Leyton Sewer Authority.* (1) The mere fact that something in the nature of a roof is placed over the water would not prevent the sub-section from being applicable to a case, if the presence of water covering the land were essential for the purposes for which the land is used, as is the case here. In the present case the pontoon must be sometimes submerged, in

(1) (1871) L. R. 6 Q. B. 669.
(2) (1862) 31 L. J. (M.C.) 266; 2 B. & S. 708.

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order that the ship may be moved on to it. In *East London Waterworks Co.* v. *Leyton Sewer Authority* (1) it would rather seem from what was said in argument that the reservoir must have had a covering over it.

Sir R. B. Finlay, K.C., in reply.

LORD ALVERSTONE C.J. The only question which is really raised by this case, and with which I intend to deal, is whether the occupation of the land with water upon it, on which the pontoons float, is to be treated as the occupation of "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. There are other questions which might be material, but, as they are not raised in the case, I do not propose to express any opinion upon them. First, no question is raised by the case as to the false jetty mentioned therein, and I express no opinion as to whether that structure or its site could be considered to be land covered with water. Again, I do not intend to decide any question of value in regard to the hereditaments included in the rate. Notwithstanding that the decision of the Divisional Court in this case may be right, there may be many cases in which the value of a wharf and premises behind may be enhanced for rating purposes by such things as these pontoons. That was in effect the decision in *Reg.* v. *Morrison* (2) and in some of the other cases, where piers and pontoons and such things have been treated as enhancing the value of a rateable subject. But this is not a poor rate case. The whole question here appears to me to be whether, in respect of a part of the rated hereditaments, the appellants are entitled to the benefit of the deduction provided for by s. 211, sub-s. 1 (*b*). Now, if it could have been contended that there was no rateable occupation by the appellants of the excavated land covered with water, and that the only rateable occupation was of the yard enhanced in value by the presence of the floating pontoons, the respondents might have been entitled to succeed; but, upon the facts stated in this case, it seems to me impossible to say that there was no rateable occupation by the appellants of the ground excavated by them, over which they

(1) L. R. 6 Q. B. 669. (2) 1 E. & B. 150.

have allowed the water to flow for the purpose of these pontoons rising and falling. They were undoubtedly liable to be rated as long as they left the land, which was above high-water mark and used for ordinary foreshore purposes, as an annex or addition to their yard, as it stood; and, had it and the yard been in different parishes, the whole rateable occupation would have had to be divided into two, in order to see how much was in one parish and how much in the other. Therefore, apart from the question which arises in this particular case, there was unquestionably a rateable occupation by the appellants of the land over which the pontoons floated. Now, must this land be treated as one with and standing on the same footing as the remainder of the appellants' hereditaments to which no exemption applies? I think not. We are bound, in my opinion, by a number of decisions, and among others the *East London Waterworks Co.* v. *Leyton Sewer Authority* (1), in which it has been held that, where there is a mixed hereditament, the occupier may be entitled to the benefit of the exemption in respect of some parts of the hereditament and not in respect of the rest. If this were a very small addition to or excrescence from the rest of the hereditament, and not capable of what may be called a separate occupation, a different question might arise, but the facts in this case go far beyond that. The ships go upon the pontoon, and while they are upon it work is done to them, which makes the occupation of the soil or site over which the pontoons float a highly beneficial occupation for the purposes of the appellants' business. Therefore it is plain to my mind that in this particular case these pontoons form a substantial enhancement of the value of the occupation of the excavation filled with water. As to whether or how, when the question of quantum arises, the total of the enhanced value thus arising ought to be divided between that land and the rest of the hereditaments, as I have already said, I express no opinion.

This brings me to the important question argued, and which we have to consider. The respondents' counsel say that this land cannot be treated as land covered with water, because permanently fixed over it are these great structures, which,

(1) L. R. 6 Q. B. 669.

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though not in themselves rateable, are capable of enhancing the value of the rateable occupation. There is no doubt that for poor law purposes the cases, such as *Tyne Boiler Works Co.* v. *Longbenton Overseers* (1), *Forrest* v. *Greenwich Overseers* (2), and *East London Waterworks Co.* v. *Leyton Sewer Authority* (3), shew that the rateable occupation of this land would be enhanced in value by the rental value of this machinery, and, that being so, it is said that the appellants under the circumstances are not entitled to the exemption, because the water has floating upon it permanently these pontoons, and the land has therefore passed out of the category of land covered with water. I rather doubt whether the particular question of roofing was treated as material in *East London Waterworks Co.* v. *Leyton Sewer Authority* (3), though I think there is some warrant for saying, as the appellants' counsel did, that there some of the structures in question were covered in, but I prefer to deal with this point independently of that argument. Now what ought to be the construction for the present purpose of the words of s. 211, sub-s. 1 (*b*), "land covered with water"? I hesitate in this case to attempt to give any exhaustive definition. I dare say other cases might arise, which would shew that any such attempted definition would require amplification or explanation. But in my opinion the words must include any case where the presence of water over the land is essential to the beneficial occupation of the land for the purpose for which it is occupied. What happens in this case? The water is let in, and must be there for the purpose of these floating pontoons being used as they are. The pontoons must be sunk under water by having water pumped into them, or by being weighted in some way or other, in order that the ship may come over them, and be blocked up or securely fastened for the purpose of being repaired; and then the pontoons must be raised to a greater or less extent by the force of the water underneath, the water in them being pumped out. Therefore it seems to me that the beneficial occupation of the land for the purposes for which it is occupied depends on there being a covering of water over it, and from this

(1) (1886) 18 Q. B. D. 81. (2) 8 E. & B. 890.
(3) L. R. 6 Q. B. 669.

point of view it is immaterial that the pontoon may be taken away occasionally to be painted or repaired. I should therefore come to the conclusion on the facts stated that the covering of water is essential to the beneficial occupation of this land; and, inasmuch as it has been decided that, in the case of a complex hereditament, there may be some part of it in respect of which the benefit of the deduction may be claimed, it is clear that, unless the contention raised for the respondents is correct in respect of the particular land in question, the appellants are entitled to succeed. Now it was ingeniously suggested that this was like a case of land with water upon it which is covered with a roof. I think that suggestion was met by the appellants' counsel, who pointed out that in this case the water flowed over the pontoons at times; but I should not myself have thought that the question whether a case came within the words of the sub-section could turn merely on such a narrow consideration as the existence or non-existence of a roof over the water. I can quite conceive that, if for the purpose of convenience some structure in the nature of a roof was erected over this land, it would not necessarily follow that the beneficial occupation would not be an occupation of land covered with water. That is expressed by Channell J. in the Court below in these words: "When an ordinary floating dock is full, a large portion, or it may be the whole, of the surface of the dock is covered by the vessels, barges, and other things covering it, but it is still, nevertheless, land covered with water, and these chattels, which are floating on the top of it, do not prevent it being covered with water in the sense in which that phrase is used in the Public Health Act, 1875."(1) I should have thought that it was not strictly accurate to speak of these pontoons as merely chattels floating in water, but still, attached as it is, the pontoon does float on the water, and the ship is on the top of the pontoon. Bray J. also puts the matter in a way which seems to me brief, correct, and compendious. He says: "The pontoons could not be used unless the land belonged to the appellants, or they were in occupation of it. They would have no right, unless they were in occupation of the land, to put a pontoon upon it. It was equally necessary that the water should go

(1) Ante, p. 325.

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upon the land in order that the vessel to be repaired might come up and be moved on to the pontoon, and be raised by means of it." (1)

In my judgment the facts shew in this case that a covering of water is essential to the occupation of that part of the land about which this question arises, and I therefore think that the decision of the Court below was right.

FARWELL L.J. and KENNEDY L.J. concurred.

Appeal dismissed.

Solicitor for appellants: *B. Duncomb Sells.*

Solicitors for respondents: *Gibson & Weldon, for E. B. Sharpley, Town Clerk, Tynemouth.*

E. L.

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Dec 16, 17.

THE KING *v.* JUDGE JAMES AND MIDLAND RAILWAY COMPANY. *Ex parte* BATH RURAL COUNCIL.

Highway—Extraordinary Traffic—Light Locomotive—Summary Proceedings—Transfer of Jurisdiction of Justices—Jurisdiction of County Court—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 1, *sub-s.* 1; *s.* 6, *sub-ss.* 1, 2; *Schedule—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1; *s.* 17, *sub-s.* 2—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 12, *sub-s.* 1; *s.* 20, *sub-s.* 3—*Heavy Motor Car Order*, 1904, *arts.* 2, 3.

An action lies in the county court to recover expenses of extraordinary traffic not exceeding 250*l.* caused by light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896, as extended by the Heavy Motor Car Order, 1904, inasmuch as expenses of extraordinary traffic not exceeding 250*l.* ceased by virtue of s. 12, sub-s. 1, of the Locomotives Act, 1898, to be recoverable summarily

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(1) Ante, p. 326.

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under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, and became recoverable in the county court; and s. 17, sub-s. 2, of the Locomotives Act, 1898, means that nothing in that Act is to affect light locomotives as distinguished from other vehicles, but it does not mean that light locomotives, as far as they have characteristics in common with other vehicles (one of which is that they may cause extraordinary traffic), are not to be dealt with by the new procedure established by s. 12, sub-s. 1, of the Locomotives Act, 1898.

RULE nisi calling on the judge of the Bath County Court, and the Midland Railway Company, defendants in an action in that county court, in which the Bath Rural District Council were plaintiffs, to shew cause why the judge should not proceed to hear and determine the action.

The action was brought in the county court under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12, sub-s. 1, of the Locomotives Act, 1898, claiming 111*l.* as extraordinary expenses incurred in repairing a highway which the plaintiffs had undertaken to repair by reason of damage caused by excessive weight passing thereon and extraordinary traffic conducted thereon by the defendants. The vehicles in respect of which the claim was brought were five motor lorries, each capable of carrying a load of from five to six tons, and it was admitted in answer to interrogatories administered by the plaintiffs that four of these lorries weighed unladen just under five tons each and the other weighed unladen five and a half tons. All the five lorries were registered as heavy motor cars under the Heavy Motor Car Order, 1904, and for the purposes of the consideration of the objection to which this report relates were taken to be not exceeding five tons in weight unladen, and therefore light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896, as extended by the Heavy Motor Car Order, 1904.

On the case coming on for trial in the county court a preliminary objection was taken on behalf of the defendants that the county court judge had no jurisdiction, as the vehicles in question were light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896, and therefore were not affected by s. 12 of the Locomotives Act, 1898 (which transferred the jurisdiction of justices in respect of claims under s. 23 of the

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Highways and Locomotives (Amendment) Act, 1878 (1), for the recovery of extraordinary expenses, and enacted that extraordinary expenses not exceeding 250*l.* should be recoverable in

(1) Highways and Locomotives (Amendment) Act, 1878, s. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

Locomotives on Highways Act, 1896, s. 1, sub-s. 1: "The enactments mentioned in the schedule to this Act, and any other enactment restricting the use of locomotives on highways and contained in any public general or local and personal Act in force at the passing of this Act, shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotives not to exceed in weight unladen four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause; and vehicles so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives.

"Provided that—

"(*a*) The council of any county or county borough shall have power to make byelaws preventing or restricting the use of such locomotives upon any bridge within their area, where such council are satisfied that such use would be attended with damage to the bridge or danger to the public:

"(*b*) A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public general or local, and of any rule, regulation, or byelaw, made under any Act of Parliament, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply accordingly."

Sect. 6, sub-s. 1: "The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used."

Sub-s. 2: "Regulations under this section may, if the Local Government Board deem it necessary, be of a local nature and limited in their application to a particular area, and may, on the application of any local authority, prohibit or restrict the use of locomotives for purposes of traction in crowded streets, or in other places where such use may be attended with danger to the public.

the county court, and if exceeding that sum in the High Court) inasmuch as s. 17, sub-s. 2, of the Act of 1898 provides that nothing in that Act is to affect light locomotives within the meaning of the Locomotives on Highways Act, 1896.

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"All regulations under this section shall have full effect notwithstanding anything in any other Act, whether general or local, or any byelaws or regulations made thereunder.

"Every regulation purporting to be made in pursuance of this section shall be forthwith laid before both Houses of Parliament."

SCHEDULE.

Enactments which are not to apply to Light Locomotives.

Part II. of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77).

Locomotives Act, 1898 (an Act to amend the Law with respect to the use of Locomotives on Highways, and with respect to extraordinary Traffic).

Sect. 12, sub-s. 1: "Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows:—

"(*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court.

"(*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work.

"(*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

Sect. 17, sub-s. 2: "Nothing in this Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896."

Motor Car Act, 1903, s. 12, sub-s. 1: "The Local Government Board, by regulations made under section six of the principal Act" (i.e., the Locomotives on Highways Act, 1896), "may, as respects any class of vehicle mentioned in the regulations, increase the maximum weights of three tons and four tons mentioned in section one of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations."

Sect. 20, sub-s. 3: "This Act may be cited as the Motor Car Act, 1903; and the Locomotives on Highways Act, 1896, and this Act may be cited together as the Motor Car Acts, 1896 and 1903."

The Heavy Motor Order, 1904, recites that by the Motor Car Acts, 1896 and 1903, provision was made with respect to the use of motor cars on highways, and in compliance with s. 1 of the Locomotives on Highways Act, 1896, which in the Motor Car Act, 1903, and in this Order is referred

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The county court judge upheld the preliminary objection, and refused to hear the case on the ground that he had no jurisdiction.

The plaintiffs thereupon obtained the rule nisi under s. 131 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), calling on the defendants and the county court judge to shew cause why the action should not be tried.

Ernest Charles, for the defendants, shewed cause. The county court judge had no jurisdiction to hear the action. The effect of s. 17, sub-s. 2, of the Locomotives Act, 1898, is to leave with justices the jurisdiction with regard to extraordinary traffic due to light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896. The vehicles were light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896. Under that statute the light locomotive had to be under three tons in weight unladen, but by s. 6 of the Act of 1896 and s. 12 of the Motor Car Act, 1903, the Local Government Board were given power to make alterations in regulations as to size, speed, and other matters. They have availed themselves of that power, and by the Heavy Motor Car Order, 1904, the maximum weight of a heavy motor car that might be used on a highway was raised to five tons when unladen. The vehicles in the present case are for the purposes of the present question to be considered as not exceeding five tons in weight unladen, and are therefore heavy motor cars

to as "the principal Act," a motor car must be under three tons in weight unladen; and recites the provisions of s. 12 of the Motor Car Act, 1903, and recites that whereas in pursuance of s. 6 of the principal Act and of s. 12 of the Motor Car Act, 1903, the Local Government Board are empowered to make regulations with respect to the use of motor cars on highways, and their construction, and the conditions under which they may be used; and that in pursuance of their powers in that behalf the Local Government Board made the following regulations which were to come into force on March 1, 1905:—

Art. 2: "In the Regulations" (i.e., the regulations in this Order)—"The expression 'heavy motor car' means a motor car exceeding two tons in weight unladen."

Art. 3: "Notwithstanding anything in the Motor Car Acts, 1896 and 1903, and except as is otherwise provided in the Regulations, a heavy motor car may be used on a highway if the weight of the motor car unladen does not exceed five tons. . . ."

within the meaning of that Order, and light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896, as extended by art. 3 of the Heavy Motor Car Order, 1904: *Star Omnibus Co.* v. *Tagg.* (1) That case shews that vehicles which are heavy motor cars under the Heavy Motor Car Order, 1904, are entitled to the benefits of the Motor Car Act, 1903. By s. 12 of the Locomotives Act, 1898, the jurisdiction of the justices in cases of extraordinary traffic was transferred to the county court if the expenses did not exceed 250*l.*, and if they exceeded that sum to the High Court; but by s. 17, sub-s. 2, nothing was to affect light motor cars within the meaning of the Locomotives on Highways Act, 1896. The result is that, as the present claim is for extraordinary expenses caused by vehicles which are light motor cars within the meaning of the Locomotives on Highways Act, 1896, the jurisdiction of the justices is unaffected by the Act of 1898, and the county court judge had no jurisdiction to try the action. The expression "affect" means doing anything which would either benefit the owner of the locomotive or take something away from him. Light locomotives, within the meaning of the Act of 1896, would be affected very much by the Act of 1898 if it were held that the jurisdiction is taken away from the justices, for the time within which proceedings can be commenced before them is by s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), limited to six months after the matter of complaint arose, while under s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, proceedings can be commenced within twelve months of the time at which the damage was done. If the Legislature had intended that light locomotives should have been affected as regards transfer of the proceedings from the justices to the county court or High Court, but in no other way, plain language would have been used in s. 17, sub-s. 2, of the Locomotives Act, 1898. In that section the word "nothing" means "nothing" in the sense that light locomotives are not to be affected at all. It does not mean that they are not to be affected except in respect to the procedure for the recovery of expenses of extraordinary traffic caused by them. [The Motor Car Order, 1903, was also referred to.]

(1) (1907) 97 L. T. 481.

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Macmorran, K.C., and *Bromley Eames*, for the plaintiffs, in support of the rule. The Highways and Locomotives (Amendment) Act, 1878, is divided into two parts. The second part deals with locomotives only. Sect. 1 of the Locomotives on Highways Act, 1896, refers to Part II. of the Act of 1878, i.e., the part dealing with locomotives only. It is therefore only Part II. of the Act of 1878 which is inapplicable to light locomotives. The general highway law in Part I., in which s. 23 is included, applies to light locomotives. It is clear from the title to the Locomotives Act, 1898, that that statute is also divided into two heads, one of which deals with locomotives and the other with extraordinary traffic. Sect. 12 is the only section which deals with extraordinary traffic. It does not affect light locomotives as such. The meaning of the statute is (s. 12) that no expenses in respect of extraordinary traffic, however that traffic is caused, are in future to be recoverable summarily, but that (s. 17, sub-s. 2) nothing in the Act is to affect a light locomotive as a light locomotive, and in respect of enactments which apply to it as distinguished from an ordinary vehicle.

CHANNELL J. The real difficulty in this case is the particular language used in s. 17, sub-s. 2, of the Locomotives Act, 1898, as to light locomotives, namely, "Nothing in this Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896."

Sect. 12 of the Locomotives Act, 1898, relates entirely to procedure in reference to extraordinary traffic, and not to any particular class of vehicles. Damage by extraordinary traffic may be done by ordinary carts as well as by traction engines and locomotives of all kinds. All kinds of vehicles, to whatever particular class they may belong, are capable of being used in such a way as to cause damage by extraordinary traffic although a particular class of vehicles may be more liable to do damage than others.

It is clear that s. 12 of the Locomotives Act, 1898, relates altogether to procedure, because, although it includes a matter which in one sense affects rights very seriously, namely, the alteration of the period of limitation within which proceedings

for the recovery of extraordinary expenses may be commenced, yet that alteration has been held to be procedure only. *Rex* v. *Chandra Dharma* (1) is the last case in which that question arose. It is true that in that case the judgments proceeded upon the general ground on which the Courts decide whether statutes ought to be interpreted as being retrospective in the sense of dealing with past events or not, and that the decision did not turn upon the use of the word "affect"; but it involved the point, because the principle is that alterations of the law which affect rights are not deemed to be retrospective. In saying that the alteration in the period within which the prosecution could be commenced was procedure only, the Court was in substance saying that the alteration did not in truth affect rights, and it proceeded upon the authority of previous cases, one of which, *The Ydun* (2), does apparently establish the principle. Applying these general grounds to s. 17, sub-s. 2, of the Locomotives Act, 1898, I agree that "nothing" means "nothing," that is, "no part," so that s. 12 amongst other parts is not to affect light locomotives, but I think they are not "affected" by a mere alteration in procedure, and, further, I think "affect" must mean affect light locomotives as such. The Act of 1898 is not to affect any privileges which light locomotives had. It is not to bring them within the description of locomotives in the various sections contained in the Act—in particular ss. 5 and 6 are important ones, dealing with locomotives as such—and the effect of the provision contained in s. 17, sub-s. 2, of the Act of 1898 is to enact that that statute shall not bring light locomotives within the operation of those sections. But the words "Nothing . . . . shall affect" a light locomotive do not mean that nothing is to affect or be applicable to a light locomotive as a vehicle not distinguished from other vehicles; and if we held that this procedure did not apply to a light locomotive regarded as a vehicle which is said to have caused extraordinary traffic the consequences would be quite absurd and ridiculous. It would follow that the justices would still have jurisdiction where extraordinary damage was caused by a vehicle which happened to be a light locomotive, and the procedure would become impracticable and

(1) [1905] 2 K. B. 335. (2) [1899] P. 236.

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unworkable. I am of opinion that the proper interpretation of the word "affect" in s. 17, sub-s. 2, of the Locomotives Act, 1898, is that "Nothing in this Act shall affect light locomotives as such and as distinguished from other vehicles"; but the words do not mean that light locomotives, as other vehicles—as far as they have any characteristics in common with other vehicles—shall not be dealt with according to the new procedure, which is really an amendment of s. 23 of the Highways and Locomotives (Amendment) Act, 1878. On these grounds I think that the provision contained in s. 17, sub-s. 2, of the Locomotives Act, 1898, does not take light locomotives out of the amended procedure under s. 12, sub-s. 1, of that Act, and consequently that the county court judge ought to hear this case.

Bray J. I am of the same opinion. I think we ought to read s. 17, sub-s. 2, of the Locomotives Act, 1898, as meaning that "Nothing in this Act shall affect light locomotives as such"; but I confess that, if it were necessary, I should not hesitate to read it, "Nothing in this Act relating to locomotives as such shall affect light locomotives," because it seems to me that the Court is entitled to look at two considerations in construing a statute: First, to look at the general course of previous legislation; secondly, at the consequences of any particular construction. When the legislation preceding the Locomotives Act, 1898, is looked at, it is seen that locomotives are dealt with specially, not always by an entire statute, but that when a statute relates to more subjects than locomotives the locomotives are put in a separate part, as, for instance, in the Highways and Locomotives (Amendment) Act, 1878, where the locomotives are dealt with in Part II. and the general provisions relating to highways are in Part I., including s. 23, which relates to extraordinary expenses. The Locomotives Act, 1898, is entitled "An Act to amend the Law with respect to the use of Locomotives on Highways, and with respect to extraordinary Traffic," and I therefore think we might if necessary construe s. 17, sub-s. 2, of that Act as having nothing to do with that part of it that relates to extraordinary traffic. Then the consequences of construing the statute in the way contended for on behalf of the defendants would be perfectly

absurd. In cases of extraordinary traffic it often happens that part of the traffic is conducted by carts and waggons and other parts by locomotives. Some vehicles may be light locomotives and others heavy locomotives. The result would be that, where there was such a claim as that in the present case, it would have to be brought before the justices with regard to all damage done by light locomotives and before the county court or High Court with regard to the rest of the damage. That could never have been intended.

And not only would the procedure be different, but having regard to s. 12, sub-s. 1 (*c*), of the Locomotives Act, 1898, the person proceeded against might also be different in the case of light locomotives from other traffic, if we accepted the contention on behalf of the defendants. These considerations induce me to say that we should be justified in inserting any words in s. 17, sub-s. 2, of the Locomotives Act, 1898, in order to avoid coming to the conclusion that it had this extraordinary result.

SUTTON J. I think the meaning of s. 17, sub-s. 2, of the Locomotives Act, 1898, is that it saves light locomotives under the Locomotives on Highways Act, 1896, from the operation of the Act of 1898 so far as that Act relates to locomotives.

Rule absolute.

Solicitors for plaintiffs: *Gribble, Oddie, Sinclair & Johnson, for R. H. Whittington, Bath.*

Solicitors for defendants: *Beale & Co., Birmingham.*

J. E. A.

C. A.
1908
March 9.

[IN THE COURT OF APPEAL.]

WORKMAN, CLARK & CO., LIMITED *v.* LLOYD BRAZILEÑO.

Practice—Action "for Debt or liquidated Demand in Money"—Claim for Instalment of Contract Price of Ship—Order XIV., *r.* 1; *Order* III., *r.* 6.

The operation of Order III., r. 6 (A), and Order XIV., r. 1, is not confined to cases in which the old action of debt would have been maintainable.

By a contract between the plaintiffs and the defendants for the construction of a steamer by the former the price of the steamer was to be 89,800*l.*, to be paid by the defendants by five instalments, which were respectively to become due at different stages of the construction of the vessel. By the terms of the contract the hull and materials of the vessel were, upon payment of the first instalment, to become the absolute property of the purchasers, subject only to the builders' lien for any unpaid purchase-money; and, in the event of any instalment of the purchase-money remaining unpaid for fourteen days after the same was due, the builders were to be entitled to interest thereon at 5*l.* per cent. per annum until payment, and, in the event of such default, they were to be at liberty to suspend the work, and the time of suspension was to be added to the contract time, or they might complete the vessel at any time after the expiry of fourteen days' notice given to the purchasers, and might sell her after completion, and any loss on such vessel was to fall upon the purchasers, and any balance of the proceeds of such sale which might remain, after satisfying all lawful claims of the builders, was to be paid by the builders to the purchasers.

The first instalment of the purchase-money having by the terms of the contract become due, and remaining unpaid, the plaintiffs brought an action for the same, and applied for leave to sign judgment for the amount so claimed under Order XIV., r. 1:—

Held, that the case came within the provisions of Order XIV., r. 1, and therefore the leave so applied for might be granted.

APPEAL by defendants from an order made by Walton J. at chambers, affirming the order of a Master, by which leave was given to the plaintiffs to sign judgment in an action under Order XIV., r. 1, as after mentioned.

The action was brought to recover the first instalment payable in respect of the contract price of a steamer, for the building of which the plaintiffs had contracted with the defendants by an agreement dated February 23, 1907, which instalment the

defendants had failed to pay, when due by the terms of the agreement, and interest thereon. (1)

The terms of the contract for the construction of the steamer, so far as material, were as follows:—

"1. The builders shall build, launch, and complete, of the best and most substantial materials and workmanship, and to the reasonable satisfaction of the purchasers' engineer or surveyor, and the purchasers shall purchase, at the price and on the terms hereinafter mentioned, a steel and iron screw steamer, with boilers, engines, machinery, outfit, and appurtenances, the same to be in accordance with the specifications and plans signed by the parties hereto (with such modifications, if any, as may afterwards be mutually agreed upon) and in conformity with the rules of Lloyds, 100 A1 three decks."

"7. The hull and materials of the said vessel, her engines, boilers, machinery, and fittings, whether such materials shall be actually on board the vessel or in the building yard, and whether wrought or not, shall from time to time, after the first instalment of the purchase price in respect of the vessel shall have been paid, and thenceforth until the vessel shall be completed and actually delivered to the purchasers, become and remain the absolute property of the purchasers, subject only to the lien of the builders for any unpaid purchase-money, and, immediately upon the payment of the first instalment of the purchase-money, the builders shall affix the name of the purchasers upon the said vessel in a conspicuous place and manner, and shall not remove the same without the purchasers' consent."

"9. In the event of any instalment of the purchase-money remaining unpaid for fourteen days after the same is due, the builders shall be entitled to interest thereon at 5*l.* per cent. per annum, until payment; and, in the event of such default, the builders are to be at liberty to suspend the work, and the time of suspension is to be added to the contract time, or they may

(1) The action was also brought for the recovery of other sums alleged to be due as instalments of the prices of vessels which the plaintiffs were constructing for the defendants; but, inasmuch as the same question arose in respect of all the sums sued for, it has been thought well, in order to avoid unnecessary complication, to make no reference to these other claims in the body of this report.

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complete the vessel at any time after the expiry of fourteen days' notice given by builders to purchasers, and may sell her after completion by public auction or private contract; and any loss on such resale shall be made good by the purchasers, and any balance of the proceeds of such sale which may remain, after satisfying all lawful claims of the builders, shall be paid by the builders to the purchasers."

"13. The price of the said steamer shall be the sum of 89,800*l.*, which the purchasers shall pay to the builders by the instalments and in manner following, namely, 17,960*l.*, in cash, when the keel of the said steamer is laid; 17,960*l.*, in cash, when the said steamer is framed; 17,960*l.*, in cash, when the said steamer is plated; 17,960*l.*, in cash, when the said steamer is launched; 17,960*l.*, in cash, when the said steamer is finished, and delivery accepted by the purchasers."

The first instalment of the price of the steamer having become payable by the terms of the contract, and not having been paid by the defendants, the action was brought to recover the amount of it with interest.

The plaintiffs applied for leave to sign judgment for the instalment sued for as above mentioned and interest thereon. The Master granted the application, and, on appeal, his order was affirmed by the judge.

Montague Lush, K.C., and *Bremner*, for the defendants. This is not a case which comes within Order III., r. 6, and therefore not one in which leave to sign judgment can be given under Order XIV., r. 1. The plaintiffs' claim is not for a "debt or liquidated demand in money" within Order III., r. 6. No property in the vessel passed to the defendants until payment of the first instalment of the price, which has not taken place; and an action of debt could not have been maintained in respect of the price under the old system of pleading till the whole of the price was due. Where a sum was payable by instalments an action of debt would not lie for one or more of the instalments before the whole was due. If the whole of the five instalments of the price had become due, and, the vessel having been completed and the property in her having passed to the defendants, the plaintiffs

were ready and willing to deliver, and tendered her to the defendants, then an action of debt might lie for the whole of the price; but until then it would not lie: *Rudder* v. *Price*. (1) It is true that Order III., r. 6, uses the words "liquidated demand in money" as well as the word "debt," and therefore the operation of the rule is not absolutely confined to cases where the old action of debt would have been maintainable; but the object of those words was apparently merely to extend the operation of the rule to cases of sums due under covenants or where the action was by an indorsee of a negotiable instrument, and not the original creditor on the instrument, and such like cases. There cannot be five actions of debt on one contract for the price of the same article. This is not like a contract for successive payments of independent sums. The price of the vessel is an entirety, though payable by instalments, and no action of debt could, according to the authorities, lie for part of the price before the whole had become due. A contract by which a person contracts to perform one work or supply one article for a price payable by five instalments is one contract, and not five, and does not create five debts, but one debt. If the purchaser does not pay one of the instalments when due, that may, under the circumstances, amount to a wrongful repudiation of the contract, in respect of which the contractor or vendor could sue, but in that case the action would be for unliquidated damages for wrongful rescission. It would appear from the judgment of Lord Loughborough in *Rudder* v. *Price* (2) that, if any action be brought for failure to pay the first of several instalments, it must take that form. But, even assuming that the vendor would have an option in such a case to bring an action in respect of non-payment of the one instalment, without treating it as a repudiation of the contract by the defendant and on the footing that the contract was kept alive, it is submitted that technically that would not be an action for a debt or liquidated demand, but for damages for breach of contract, and that the damages would not necessarily be measured by the amount of the instalment.

[LORD ALVERSTONE C.J. The object of provisions for payment by instalments appears to be to put the contractor, who has to

(1) (1791) 1 H. Bl. 547. (2) Ibid. at p. 552.

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incur great expense in labour and materials during the progress of the work, in funds to meet these expenses.]

The damages for breach of a contract to make an advance are clearly, according to the authorities, not the amount of the promised advance. [They also cited Chitty on Pleadings, 7th ed. pp. 110-15; *Dunlop* v. *Grote* (1); 2 Williams' Saunders, 5th ed. p. 303, edition by Sir E. Vaughan Williams, vol. 2, p. 698; *Laird* v. *Pim*. (2)]

J. R. Atkin, K.C., and *Holman Gregory*, for the plaintiffs. The rule of law which governs this case is laid down in the passage from 1 Williams' Saunders, 5th ed. p. 320 (*c*), edition by Sir E. Vaughan Williams, p. 552, in the notes to *Pordage* v. *Cole*, the effect of which is stated in the notes to *Cutter* v. *Powell* (Smith's Leading Cases, 11th ed. vol. 2, p. 12) as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." This rule was acted on in *Mattock* v. *Kinglake* (3), which was an action of debt; and it applies exactly to the present case. *Rudder* v. *Price* (4) is not really in point. It is not altogether easy to understand the effect of the judgment in that case, which appears really to have turned on the technical rules of pleading with regard to the old action of debt. It is not necessary, in order to bring a case within Order III., r. 6, to shew that an action of debt would have been maintainable under the old law. The words of Order III., r. 6, are "debt or liquidated demand in money"; and an action of assumpsit was maintainable for one instalment of a sum payable by instalments under the old law where debt would not lie.

[KENNEDY L.J. on this point referred to Bacon's Abridgment, 7th ed. vol. 2, tit. "Debt" B., p. 620.]

The result of the defendants' contention is that the plaintiffs

(1) (1845) 2 C. & K. 153.
(2) (1841) 7 M. & W. 474.
(3) (1839) 10 A. & E. 50
(4) 1 H. Bl. 547.

must either treat the failure to pay an instalment as a repudiation of the contract, and sue for a wrongful rescission of it, or wait till the completion of the work before bringing any action in respect of the price. This is quite contrary to many authorities, which shew that in such cases the plaintiff has an option either to treat the breach as a repudiation of the contract, or to treat the contract as still subsisting and sue merely for the particular breach. The Sale of Goods Act, 1893, s. 49, sub-s. 2, applies to this case. [They also cited *Gray* v. *Pindar*. (1)]

Montague Lush, *K.C.*, for the defendants, in reply. If the plaintiffs' contention is correct, it might involve great hardship to the defendants in such cases. Assuming that they could be made by action to pay the first instalment under such a contract as this, and then they were unable to pay the second, the plaintiffs might treat that as a repudiation of the contract and refuse to deliver the ship, which possibly they might sell at a profit upon the contract price, and the defendants would have lost their money altogether and have got no ship. Sect. 49, sub-s. 2, of the Sale of Goods Act, 1893, only applies to an action for the whole of the price of goods.

LORD ALVERSTONE C.J. In this case the learned judge at chambers has given leave to sign judgment under Order XIV., r. 1; and, on appeal against his order, it has been argued for the defendants that there was no jurisdiction to make such an order in respect of such a claim as is made in this action. The claim in the action is for the first instalment of the price of a steamer, which is alleged to have become due from the defendants to the plaintiffs under a contract for the construction of the steamer by the latter. By the terms of this contract the price of the vessel, which was to be 89,800*l*., was to be paid by five instalments, to become due respectively at different stages of the ship's construction, and, the action being brought in respect of non-payment of the first instalment as and when it became payable under the contract, it is, as I have said, contended that in such an action

(1) (1801) 2 Bos. & P. 427.

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there is no jurisdiction to give leave to sign judgment under Order XIV.

Now, whatever view may be taken as to the effect of the old law with regard to the action of debt as applicable to such a claim as this, this case must be governed by the language of Order XIV., r. 1, and Order III., r. 6. By the terms of Order XIV., r. 1, it is made applicable only to cases "where the defendant appears to a writ of summons specially indorsed under Order III., r. 6." The jurisdiction under Order XIV. therefore depends upon the case being one in which the writ may be specially indorsed under Order III., r. 6. The terms of that rule, so far as material for the purposes of the present case, provide that the writ may be specially indorsed "in all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract expressed or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt)." The first matter to be considered, for the purpose of applying the terms of that rule to the present case, is the language of the contract as regards the payment of the price of the vessel. By clause 7 of the contract it is provided that the hull and materials of the said vessel, her engines, boilers, machinery and fittings, shall from time to time, after the first instalment of the purchase price of the vessel shall have been paid, be the property of the purchasers, subject only to the vendors' lien for any unpaid purchase-money; and by clause 13 it is provided that "the price of the said steamer shall be the sum of 89,800*l.*, which the purchasers shall pay to the builders by the instalments and in manner following, namely, 17,960*l.*, in cash, when the keel of the said steamer is laid; 17,960*l.*, in cash, when the said steamer is framed; 17,960*l.*, in cash, when the said steamer is plated; 17,960*l.*, in cash, when the said steamer is launched; 17,960*l.*, in cash, when the said steamer is finished, and delivery accepted by the purchasers." It is not disputed that the events upon which the instalment sued for was by the contract to become payable have happened. It is, however, suggested that, by reason of some rule of law to be deduced from the old authorities as to the action of debt,

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or the principle upon which they were founded, the claim in this action is not for a "debt or liquidated demand in money" within the meaning of Order III., r. 6. I cannot take that view. One knows that, in the case of contracts of this kind, e.g., contracts for the construction of ships or buildings, where the contractor has to incur heavy expenditure for labour and materials to be used in the work contracted for, it is the practice to insert provisions, such as were inserted in the present case, for payment of the contract price by instalments as the work proceeds, and I cannot understand why, or on what principle, the claim for such an instalment, when it becomes due according to the terms of the contract, should not be regarded as "a liquidated demand in money" within the meaning of Order III., r. 6. It seems to me to answer exactly to the description contained in the rule as being a liquidated demand in money payable by the defendant under an express contract. The suggestion made, as I understand it, was that, because, in such a case, the shipbuilder, still having the ship, so far as she is built, in his hands, may later on, if the purchaser finally makes default in carrying out his side of the contract, be in a position to dispose of the ship, possibly at a profit, the claim in respect of this instalment must be one for unliquidated damages only, and therefore is not within the words of the rule. I am unable to assent to this suggestion. It seems to me clear, from a business and common-sense point of view, that, if, in consideration of the shipbuilder's finding materials and labour and carrying out the work of building the ship up to a certain stage, the purchaser agrees, when the work has reached that stage, to pay him a certain sum in cash, that is an express contract to pay a liquidated sum in that event, and within the meaning of the rule, and that it makes no difference in principle that four other instalments of the price of the work are subsequently to become payable on other events. I think that this contract is for the present purpose to be regarded as an express contract to pay five different liquidated sums of money upon five different events.

The question is whether we are precluded by any authority or rule of law from giving effect to what appears to me to be the

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substance of the matter. The case of *Rudder* v. *Price* (1) was cited as a conclusive authority in favour of the defendants' contention. In my opinion the decision in that case turned upon a point of pleading and upon a point of pleading only. It is not necessary for me to go through the whole of the judgment in order to shew this. It will be sufficient to read the concluding passage of it. Lord Loughborough there says: "I cannot indeed devise a substantial reason why a promise to pay money not performed does not become a debt, and why it should not be recoverable eo nomine as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of assumpsit, no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and, being so considered, no action of debt can be maintained upon it, till all the days of payment be past." The decision was upon a special demurrer, and appears to have turned on the distinction between the old action of debt and the action of indebitatus assumpsit. That case does not assist us in any way in determining the question whether the claim in such a case as this is for a liquidated demand in money within the meaning of the particular rule now in question. The distinction for this purpose between the action of debt and assumpsit is also referred to in the passage from Bacon's Abridgment, 7th ed. vol. 2, tit. "Debt" B, p. 620, which has been referred to by Kennedy L.J. This case appears to me to fall within the proposition laid down in the notes to *Pordage* v. *Cole*, 1 Williams' Saunders, 5th ed. p. 320 (*c*), which is referred to in the notes to *Cutter* v. *Powell*, Smith's Leading Cases, 11th ed. vol. 2, p. 12, where it is stated that, if a day be appointed for payment of money, or part of it, and the day is to happen, or may happen, before the thing which is the consideration of the money, an action may be brought for the money before performance. The case of *Mattock* v. *Kinglake* (2) also shews that, where an agreement provides for the payment of a sum of money, and does not make the performance of the thing which is the consideration for the payment a condition precedent to or concurrent with the

(1) 1 H. Bl. 547. (2) 10 A. & E. 50.

payment, an action may be maintained for the recovery of the sum of money without such performance. In the present case all that the plaintiffs have to shew in order to entitle them to payment of the instalment for which the action is brought is that they have fulfilled the conditions upon which this instalment is by the contract made payable. We could not, I think, uphold the defendants' contention consistently with a series of authorities, of which *Simpson* v. *Crippin* (1), *Honck* v. *Muller* (2), *Freeth* v. *Burr* (3), and *Morgan* v. *Bain* (4) are examples, and the result of which, as it appears to me, is to establish the rule that, where there is a contract for goods to be delivered and paid for by instalments, on failure by one of the parties to make delivery of part, or to pay an instalment, as the case may be, the other party has his election, where the circumstances admit of the view that the particular breach amounts to a repudiation of the whole contract, to treat it as such and sue for damages on that footing, or to treat the contract as still alive and sue merely for the particular breach. Without laying too much stress upon the provisions of the Sale of Goods Act, 1893, s. 49, as bearing on the present question, it may be observed that by sub-s. 2 of that section it is provided that, "where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract." The defendants' counsel contended that this sub-section does not apply to a case where the price of the article sold is payable by instalments. I do not quite see why it should not; but, however that may be, I think it is clear that there was here such a liquidated demand in money as suffices to bring the case within Order III., r. 6, and therefore within Order XIV., r. 1. For these reasons I think the appeal must be dismissed.

FARWELL L.J. I am of the same opinion. I agree that, upon the true construction of this contract, it contains separate

(1) (1872) L. R. 8 Q. B. 14.
(2) (1881) 7 Q. B. D. 92.
(3) (1874) L. R. 9 C. P. 208.
(4) (1874) L. R. 10 C. P. 15, at p. 21.

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promises to pay five several sums on the happening of five several events. If that be so, it can make no difference that all the promises are contained in one document. But, even if, on its true construction, it must be regarded as one contract to pay the whole of the sum named as the price of the ship by five instalments, each instalment is to become due and payable upon the happening of the particular event specified in that behalf by the contract, e.g., the first instalment is to become payable upon the laying of the keel of the ship. In my opinion the claim for that instalment upon the happening of that event is a liquidated demand in money within the meaning of Order III., r. 6. It has been argued that technically the claim arising upon default in payment of such an instalment is a claim for damages, and not for a liquidated sum. I confess that I cannot follow this argument. I do not feel myself sufficiently familiar with the old doctrines of common law pleading to appreciate fully the difficulty which, it is suggested, would have arisen as regards an action of debt in such a case, but I can see no reason for excluding from the operation of Order III., r. 6, any action falling under any of the eight common indebitatus counts, which is brought on an executed consideration for a fixed sum agreed to be paid for such execution. Such a case is within the words of the rule, and I object to obscuring the plain meaning of the words by recourse to the rules of special pleading in the time of Lord Loughborough. But, if any such difficulty could now arise, I think that it is met by s. 49 of the Sale of Goods Act, 1893. The terms of that section appear to me to apply to the sale of goods for a price to be paid by instalments; but, if on that section, standing alone, any doubt might arise, it is cleared up by s. 31, which contemplates the case of goods to be delivered by stated instalments which are to be separately paid for, and states that in such a case, where "the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim

for compensation, but not to a right to treat the whole contract as repudiated." It is particularly to be noticed that in this provision the term "compensation" is used instead of the term "damages," which is the usual correlative of the term "breach," the reason being, I think, that the provision was intended to cover both cases where damages properly so called were recoverable, and cases where the breach consisted in non-payment of the price of an instalment of the goods. The defendants' counsel argued that, in a case of this kind, it would be a hardship on purchasers that, after they had paid one instalment of the price of the ship, if they should ultimately fail to perform the contract, they would lose their money, though the plaintiffs should sell the ship for a larger amount than the contract price. That consideration does not seem to have impressed the minds of James L.J. and Mellish L.J. in the case of *Ex parte Barrell* (1), where, upon a sale of real estate, the purchaser, after paying part of the purchase-money by way of deposit, became bankrupt and failed to complete the contract. There was no provision for forfeiture of the deposit in case the purchase went off through the purchaser's default. An action having been brought by his trustee in bankruptcy, who had disclaimed the contract, to recover the deposit, James L.J. said in giving judgment: "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, Give me back the deposit. There is no ground for such a claim." Mellish L.J. said, "if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default."

KENNEDY L.J. Though the matter hardly seems to me so clear as it does to my Lord and my brother Farwell, on the whole I have come to the conclusion that we ought not to interfere with the order of the learned judge at chambers. The question is whether this is an action which comes within the purview of Order XIV., r. 1. That depends on whether it is an action for "a debt or liquidated demand in money" within the

(1) (1875) L. R. 10 Ch. 512.

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meaning of Order III., r. 6. There is nothing, so far as I can see, in the nature of the claim, apart from its being a claim for an instalment forming part of a larger sum contracted to be paid, to prevent its coming within the before-mentioned rules. It is not easy to unravel the intricacies of some of the old cases on the subject of the action of debt, and to separate what is mere technicality from what is substance in the reasoning upon which the decisions given in those cases were based; but there certainly seems to be ground for saying that it has been held, with regard to certain classes of money demands, that an action could not be maintained for recovery of an instalment by itself, although stipulated to be paid by a certain day, where such payment would form fulfilment in part only of a contract to pay a larger sum. But in this case we have not to deal with a question depending merely on the old forms of pleading, or the distinction between the action of debt and that of indebitatus assumpsit. We have to deal with the system of pleading as it now exists; and I have heard nothing during the argument which satisfies me that the provisions of Order XIV. cannot be applied in the case of an action to recover an instalment of money, such as that here sued for, merely because under the old system of pleading an action of debt, strictly so called, as distinguished from an action of indebitatus assumpsit, would not lie for an instalment of a larger sum to be paid under a contract. Had there been any doubt whether, upon the true construction of the contract, this instalment was, in the events which have happened, presently payable, I should have thought that the case was not one for the application of Order XIV.; but it seems to me, having regard to the particular terms of this contract, that the case comes within the rule laid down in Bacon's Abridgment, which gives the right to sue for one instalment or partial payment separately. That being so, the question is whether the claim is for a "liquidated demand in money" within the meaning of Order III., r. 6; and, there being, so far as I can see, now that we have no longer to deal with the ancient forms of pleading or to apply reasoning that depended on those forms, nothing which compels us to take the contrary view, the conclusion at which upon the whole I arrive is that this claim is for a

liquidated demand in money within the meaning of the rule. One would expect to find in s. 49 of the Sale of Goods Act, 1893, which clearly applies to cases where the price of goods is not payable by instalments, some suitable words of limitation, if it were intended that it should not apply to cases where the price of goods is payable by instalments. The result is, in my opinion, that the words of Order XIV., the effect of which depends upon whether the case comes within the words of Order III., r. 6, are applicable to this case. With all respect to the editors of the Annual Practice, I must say that, according to the view which I take, the language of their note on Order III., r. 6, where, with reference to the words "debt or liquidated demand," they say, "These words seem properly applicable to a definite sum of money which would formerly have been recoverable in the old common law action of debt in its most technical form," does not appear to me to be correct.

Appeal dismissed.

Solicitors for plaintiffs: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for defendants: *Armitage & Chapple.*

E. L.

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[IN THE COURT OF APPEAL.]

In re HIRST & CAPES.

Practice—Costs—Solicitor—Taxation—Agreement by Third Party to pay Costs—Question as to Construction of Agreement—Jurisdiction of Master—Payment of Bill—"Special Circumstances."

Where there is an agreement by a third party to pay costs due to a solicitor from his client, it is not a bar to an application by the third party for taxation of the solicitor's bill under the Solicitors Act, 1843, s. 38, that questions will arise on the construction of the agreement, inasmuch as the taxing Master has jurisdiction to determine such questions for the purposes of the taxation.

Observations of Lord Langdale M.R. in *In re Rhodes*, (1844) 8 Beav. 224, and *In re Thompson*, (1845) 8 Beav. 237, not followed.

The "special circumstances" which justify the reference of a solicitor's bill of costs for taxation after payment are not confined to pressure, overcharge, or fraud, but include any circumstances of an exceptional nature which a judge in the exercise of a judicial discretion may consider to justify such taxation.

In re Norman, (1886) 16 Q. B. D. 673, followed.

Appeal from an order made by Ridley J. at chambers, by which he affirmed an order of a Master dismissing a summons issued by the appellants for the taxation of a bill of costs.

In the year 1904 an action was brought by one Emma Elsworth against the appellants, as the executors of one Fox, to recover certain moneys alleged to be due to her under a deed made between the plaintiff of the first part, the defendants' testator of the second part, and one Francis Barber of the third part, whereby the testator covenanted to pay a certain weekly sum to the plaintiff.

In July, 1906, that action was settled by an agreement of compromise made between the plaintiff and the defendants, which was sanctioned by the Court, and whereby it was agreed that the sum of 920*l.* should be paid by the defendants to the plaintiff in respect of arrears due under the deed, and certain weekly payments should be made in the future for the benefit of the plaintiff and her children. It was further provided by the agreement of compromise that the costs of all parties, as between solicitor and client, in relation to the claim of the plaintiff

against the defendants, both of and prior to the action, and of the negotiation for the preparation and execution of the agreement, and of the proceedings for confirming the same, and of the preparation and execution of the deed to be executed as thereinafter provided, and all other acts and things necessary for giving effect to the agreement, should be borne and paid by the defendants out of the testator's estate; that all further proceedings in the action should be stayed, and either party might apply for an order to that effect on giving due notice of such application to the other party; and that a proper deed should be prepared and executed by all necessary parties for giving effect to the agreement, to be settled by counsel for the parties, or, in case of disagreement between them, by the judge in chambers.

A discussion by correspondence subsequently took place between the solicitors for the plaintiff and the solicitors for the defendants as to whether or not the costs of the former should be taxed and paid before a summons for a stay of the action was applied for, the plaintiff's solicitors contending that the taxation should take place before the staying of the action, and the defendants' solicitors the contrary, and also as to the proper form of summons for a stay and taxation of costs. On October 7, 1907, the defendants' solicitors wrote to the plaintiff's solicitors as follows: "On reconsideration we have come to the conclusion to adopt the course which we understand you suggest, and that is that the action should not be stayed till the costs have been taxed and paid. We are therefore not proposing to issue the summons till that has been done. Will you therefore let us have your costs as soon as you possibly can." On October 9, 1907, the defendants' solicitors again wrote to the plaintiff's solicitors as follows: "In reply to your letter of yesterday's date, it does not seem to us that there would be any good in issuing a summons upon which we are not agreed. We have therefore adopted your original suggestion that the costs should be taxed and paid before we apply to stay, and, if you will kindly let us have a copy of your costs, we will apply to tax them at the earliest possible moment. After that we will consider whether there is any object in staying the action." On October 22, 1907, the plaintiff's solicitors wrote to the defendants' solicitors stating that the plaintiff had paid

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their costs in the matter, amounting to 311*l.* 7*s.* 4*d.*, and they were instructed by her to apply to the defendants for immediate payment of the amount, and that they must therefore ask for a remittance of the amount in the course of the week, failing which they were instructed to take proceedings. On October 24, 1907, the defendants' solicitors wrote to the plaintiff's solicitors as follows: "Referring again to your letter to us of the 22nd instant, our clients are quite prepared to pay Miss Elsworth's costs in accordance with the agreement, but, before they pay, they must of course see your bill, and, as they are executors and trustees and may have hereafter to justify their payments, it is probable that they will be obliged to tax your bill. Will you therefore kindly forward it to us at once?" On the same date the plaintiff's solicitors answered stating that they were in receipt of the defendants' solicitors' letter of that date, and would be happy to shew them their bill of costs against the defendants at any time they liked to call for the purpose, and would be pleased to make them a copy of the bill if they wished it on the usual terms. On October 25, 1907, an originating summons was taken out on behalf of the defendants, the appellants in the present appeal, asking that the bill of costs of the solicitors of the plaintiff, Emma Elsworth, against her, which the applicants had become liable to pay under the agreement of compromise, should be referred to the taxing Master for taxation in accordance with the provisions of the said agreement, with all usual directions. The Master refused the application, and on appeal the judge affirmed his decision. An action was brought on November 22, 1907, by the plaintiff against the appellants, the defendants in the first-mentioned action, claiming from them, under the agreement of compromise, payment of the amount of the costs paid as above mentioned by the plaintiff to her solicitors, which action was still pending.

It appeared that the bill of costs delivered by the plaintiff's solicitors to the plaintiff included the costs of and incidental to an amendment of the plaintiff's pleadings in the first-mentioned action, in respect of which the plaintiff had been ordered to pay the defendants' costs, and also the costs of an application at chambers to settle the deed embodying the

terms of the compromise, upon which application the plaintiff was ordered to bear her own costs. It was stated in argument that the learned judge at chambers had expressed an opinion that to come within s. 38 of the Solicitors Act, 1843, a party must be liable to the solicitor for the bill of costs, but it did not clearly appear upon what precise ground the Master and judge had refused the application for taxation.

The defendants appealed against the decision of the judge. The plaintiff was added as a respondent to the appeal by order of the Court of Appeal.

Danckwerts, K.C. (*J. A. Compston* with him), for the appellants. It would appear that the learned judge at chambers thought that, in order to be entitled to apply for taxation under s. 38 of the Solicitors Act, 1843, a party must be liable to the solicitor for the costs, but that is not so. Such a party would be a party "chargeable" with the bill of costs under s. 37 of the Act. There were "special circumstances" in this case to justify an order for taxation, although the client had paid the bill, and there is no reason why it should not be referred to taxation under s. 38 in the ordinary way. The circumstances under which payment of the bill was made, namely, after notice that it was intended to apply for taxation, and some of the items included in the bill, e.g., items in respect of costs ordered by the judge at chambers to be borne by the plaintiff herself in any event, which costs could not be covered by the agreement of compromise, are quite sufficient to call for taxation, notwithstanding payment of the bill. No question can really arise as to the construction of the agreement to pay costs. The learned judge at chambers appears not to have gone into the question whether there were "special circumstances," so that there is no question of overruling any discretion exercised by him in the matter. [He cited *Vincent* v. *Venner* (1); *In re Early.*(2)]

A. H. Poyser (*Koppel* with him), for the respondents. A question would arise on taxation as to the construction of the agreement of compromise as regards costs, namely, whether it means that the appellants are to indemnify the plaintiff against all the costs

(1) (1833) 1 My. & K. 212. (2) [1897] 1 I. R. 6.

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of the litigation and other costs, i.e., to pay costs "as between solicitor and own client," in which case the taxation would be on the footing that the third party stands in the shoes of the client, or merely that they are to pay the plaintiff's costs on the basis applicable in ordinary cases where a party other than the client has been ordered to pay costs as between solicitor and client. That being so, the bill ought not to be referred for taxation under s. 38 of the Solicitors Act, 1843, but the true construction of the agreement ought to be ascertained in the action now pending upon it for the bill of costs; and then, on a verdict being obtained for the plaintiff in that action, there will be taxation by virtue of the inherent jurisdiction of the Court over its own officers, in order to ascertain for what amount the judgment is to be. In the cases of *In re Rhodes* (1) and *In re Thompson* (2) Lord Langdale M.R. said that there was in such a case no jurisdiction to construe the agreement for payment of costs on taxation. (3) There may be great hardship imposed upon the solicitors by ordering taxation under s. 38 of the Solicitors Act, 1843, in such a case as this. There are items in the bill which are perfectly legitimate charges as against the client, but as to which the question whether they are recoverable as against the appellants depends upon the true construction of the agreement of compromise. The Solicitors Act, 1843, only contemplates the delivery and taxation of one bill, namely, that delivered to the client. The result of a taxation under s. 38 of the Solicitors Act, 1843, may be that, if the Master construes the agreement as not covering these costs, one-sixth is taxed off in respect of such items, and thus, though the solicitors rightly included them in the bill, they would be rendered liable to the costs of the taxation. The same result would not follow upon a taxation after verdict in the action for the bill of costs. (3) The respondents

(1) 8 Beav. 224.

(2) 8 Beav. 237.

(3) In answer to inquiries by the Court of Appeal Master Macdonell reported: (1.) That, where, in an action on a solicitor's bill of costs, there has been no verdict, the order usually is in the form given in *Smith* v. *Edwardes*, (1888) 22 Q. B. D. 10, which directs that taxation shall be according to the statute; that the taxing Master in such case, having taxed the bill, deducts or adds the costs of taxation according as one-sixth is or is not disallowed; and the allocatur is then given for the net amount,

ought to be allowed, before taxation, to have the true construction of the agreement settled in the action. The extent of the liability of the third party being disputed ought to be determined in the action before taxation. A third party does not come under the operation of s. 38 until his liability is determined. The liability being in dispute, it was the proper course to bring an action in order to determine it. *In re Cohen & Cohen* (1) only decided that, where an order for taxation under s. 38 had been obtained, the liability of the third party was not enlarged by taxation under that section. It is submitted that s. 38 really only applies where there is a third party liable by agreement to indemnify the client against all costs incurred. [He also cited on this point *In re Gray* (2); *Storer & Co.* v. *Johnson* (3); *In re Jessop* (4); *In re Robertson* (5); *In re Massey.* (6)] The bill having been paid, there must be "special circumstances" in order to justify taxation. There were no such circumstances in this case. Although no doubt, according to recent decisions, it is not absolutely necessary that there should be oppression, overcharge, or fraud to constitute special circumstances for this purpose,

which net amount is then inserted in the judgment; but that, if the reference to the taxing Master is after verdict, the reference would be, in the ordinary course of things, not under the statute, and the one-sixth principle would not apply: see *Lumsden* v. *Shipcote Land Co.*, [1906] 2 K. B. 433. (2.) That, with regard to taxation at the instance of a third party, when he was a taxing Master the practice was to treat the third party as standing in the shoes of the original client, but, in the absence of an agreement to pay all that the original client was bound to pay, with certain reservations, e.g., as regards items which the agreement by which the third party was charged could not have contemplated; but that of late there had been a series of decisions, among which were *In re Gray*, [1901] 1 Ch. 239, *In re Longbotham & Sons*, [1904] 2 Ch. 152, and *In re Cohen & Cohen*, [1905] 2 Ch. 137, which direct the taxing Master to disallow in third party taxations items which he thought might once have been allowed, the principle being clearly stated in *In re Cohen & Cohen*, at pp. 142, 143.

Master Shearme reported to the effect that, according to his view, the practice on a third party taxation was for the Master to construe the agreement by which the third party agreed to pay costs, in order to determine the rights of the parties.

(1) [1905] 2 Ch. 137.
(2) [1901] 1 Ch. 239.
(3) (1890) 15 App. Cas. 203.
(4) (1863) 32 Beav. 406.
(5) (1889) 42 Ch. D. 553.
(6) (1865) 34 Beav. 463.

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nevertheless there must, it is submitted, be something analogous thereto: *In re Boycott.* (1) The plaintiff should have been made a party to the proceedings for taxation, but this was not done.

Danckwerts, K.C., for the appellants, in reply. There can be no real question in this case as to the construction of the terms of the agreement of compromise with regard to costs, and if there were it would be no obstacle to the taxation under the Solicitors Act, 1843, s. 38. The suggestion that, because there is a dispute as to the construction of the agreement affecting certain items in the bill, there must, before taxation can be obtained, first be an action to determine the construction of the agreement is groundless. The observations cited from the judgment of Lord Langdale in *In re Thompson* (2) were mere obiter dicta, because the Master of the Rolls held that there were in that case no special circumstances to justify taxation after payment; and in *In re Rhodes* (3) it would appear that an action on the bill of costs was pending at the time of the application, which was not so in the present case when the application for taxation was made. These observations have not in practice been regarded. The practice in such cases has for a long time been for the taxing Master to construe the agreement for the purpose of dealing with items in the bill. If he decides wrongly as to the construction, there is an appeal to the judge, and, if necessary, to the Court of Appeal. This practice is quite in accordance with the general practice in cases where there is a dispute as to the solicitor's retainer. If the existence of any retainer is denied, that question cannot be decided on taxation, because that denial would be inconsistent with the right to taxation under the Solicitors Act, but, if the client merely disputes the retainer as regards certain items in the bill, the Master has for the purposes of taxation to decide that dispute: see *In re Herbert.* (4) In almost all of these cases of taxation at the instance of a third party the liability of the third party is under an agreement, and, if the contention of the respondents is right, in all such cases, when there was any dispute as to the effect of the agreement, there could be no taxation under the Solicitors Act, 1843, s. 38. In

(1) (1885) 29 Ch. D. 571.
(2) 8 Beav. 237.
(3) 8 Beav. 224.
(4) (1887) 34 Ch. D. 504.

such cases it is always necessary for the Master to determine whether a particular item comes within the agreement. If in the case of an oral agreement, or one contained in a long correspondence, it were doubtful what terms had been agreed upon, or if there were other special circumstances, then the judge could always direct an issue to determine the question. [He cited on this point *In re Gray* (1); *In re Negus* (2); *In re Cohen & Cohen* (3); *In re Longbotham & Sons.* (4)]

There is really no hardship involved in the operation of the one-sixth rule, as suggested by the respondents, for the claim made against the defendants is for the whole amount of the bill of costs paid by the plaintiff; and, if the respondents fail on the taxation to substantiate items amounting to one-sixth of the bill, it is just that they should pay the costs. With regard to the existence of "special circumstances," it is now well settled that "special circumstances" are not confined to pressure, overcharge, or fraud, and that the existence of such circumstances is a matter for the judicial discretion of the judge or the Court, to be exercised in relation to the circumstances of the particular case: *In re Norman.* (5) In this case the action for the bill of costs was obviously brought to avoid taxation under the Solicitors Act, 1843, and so to avoid liability to pay the costs of the taxation, if one-sixth of the bill were taxed off.

VAUGHAN WILLIAMS L.J. This is a case in which I am afraid that I do not take quite the same view as, I believe, my learned brothers do. Here taxation of a bill of costs was asked for under s. 38 of the Solicitors Act, 1843, by the appellants, who had become liable to pay costs under an agreement of compromise by which a pending action was settled. Now, unfortunately, the question whether there were special circumstances in this case by virtue of which taxation could be ordered, notwithstanding the fact that the bill of costs had been paid, would appear not to have been dealt with either by the Master or the judge at chambers, but will, if we decide it, be decided for the first time in this Court.

(1) [1901] 1 Ch. 239.
(2) [1895] 1 Ch. 73.
(3) [1905] 2 Ch. 137.
(4) [1904] 2 Ch. 152.
(5) 16 Q. B. D. 673.

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I have considerable doubt whether, if this matter had come before me for decision by myself alone in the first instance, I should have come to the conclusion that there were such circumstances. No one now says that "special circumstances" must necessarily be circumstances of fraud, dishonest practice, or extortion, or anything of that kind. It appears to be clear since the case of *In re Norman* (1) that that is not so. The Court there held that, inasmuch as the Legislature has not in the Solicitors Act, 1843, given any definition of "special circumstances," they must refuse to formulate any such definition; but it is also plain that, although the question whether there are special circumstances is one for the exercise of the judge's discretion in each particular case, the discretion which he has so to exercise is a judicial discretion; and, if a Court of Appeal think that in what he has decided he has clearly not exercised a judicial discretion, they may overrule his decision, but otherwise they will not interfere with it. In this case we have, in the first instance, to exercise this discretion, without being either hampered or assisted by any decision of the Master or the judge as to the question whether there were special circumstances. In my view it is plain that, without making any imputations whatsoever on either of the two firms of solicitors engaged in this case, who, so far as I know, are of high character and standing, they were here really playing a game, so to speak, of chess against one another with regard to the mode in which these costs should be taxed. I do not see myself that there was any impropriety in any of the steps taken on either side, and, that being so, if I had had in the first instance to decide the matter alone, I think I should have hesitated to say that there were any special circumstances in this case. I do not find that, at any time during the proceedings at chambers before the Master or the judge, any allegation was made complaining that any of the items in the bill were exorbitant, or overcharges, or improper. It is true that since then an affidavit has been made by one of the appellants' solicitors, which does specify certain items in the bill which he regards, not as being improper in point of amount, but as being outside the provision as to costs

(1) 16 Q. B. D. 673.

contained in the agreement of compromise. In one of the cases to which he refers, for instance, it is alleged that the charges made are not chargeable as against the appellants by reason of the decision of a judge at chambers. The agreement of compromise provided, amongst other things, that there should be a deed for giving effect to the agreement, and that, in case of disagreement, it should be settled by the judge in chambers. On an application at chambers with regard to the terms of this deed, the judge before whom the matter came declined to allow the plaintiff any costs of the application. It was said that it was impossible to regard the defendants as liable to pay these costs under the terms of the agreement of compromise, and no doubt prima facie there is a difficulty as regards these items. The case is not so clear to my mind as regards other items mentioned in the affidavit. I have great doubts myself whether, under the circumstances, matters such as these, in the absence of any improper conduct by the solicitor, ought to be treated as special circumstances which would justify taxation of his bill after payment within the meaning of s. 41 of the Solicitors Act, 1843, but I understand that my learned brothers think otherwise.

I will now consider upon what grounds the learned judge at chambers refused the application for taxation. I gather from the affidavits that he had before him the whole history of the case, the circumstances under which the first action was brought, the relation of the defendants, as executors of their testator, to the plaintiff, the whole of the negotiations with regard to the taxation of costs, and all the steps which had been taken in the litigation down to the time when the case came before him; and I think it must be taken that he was of opinion that the case was not one in which it was necessary for the purposes of taxation to make the order which was asked for at the time when the application was made. I wish, however, that we had more precise information than we have as to the grounds on which the Master and judge acted in refusing to make the order for taxation. It has not been suggested that it was not a matter for the judge's discretion under the circumstances whether he would make the order for taxation or not. I presume that his attention must

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have been called to the fact that it was intended to bring an action for the costs to which the plaintiff was entitled under the agreement of compromise, and therefore that there was another mode in which a decision might be obtained as to the construction of the provisions of that agreement with regard to costs, namely, by trial of that action. If such an action had been actually pending at the time when the application for an order for taxation under s. 38 was made, I should have thought that the proper course would have been to refuse to make an order for taxation till after that action had been tried. When the application was made in this case, however, there was no action actually pending, which certainly makes a considerable difference. I have no doubt myself that, when there is no dispute between the parties as to the existence of an agreement for payment of the costs by the third party, or the construction of it, then, if neither party objects, the bill of costs may go before the Master for taxation, and, there being no dispute, he will have jurisdiction to construe the terms of the agreement so far as may be necessary for the purposes of the taxation; on the other hand, as regards cases where there is a dispute as to the construction of the agreement, I should have thought, apart from any conclusion as to the law on the subject which may be arrived at by reason of the subsequent practice with regard to taxation, that there was a good deal to be said for the view expressed by Lord Langdale M.R. in the cases of *In re Rhodes* (1) and *In re Thompson* (2) which have been cited to us. Having regard, however, to what appears to be the practice on the subject, and the view taken by my learned brothers, I do not think it is necessary for me to discuss the matter any further. I feel a difficulty myself in saying that the learned judge at chambers exercised his discretion in the matter wrongly in the absence of fuller knowledge as to the grounds on which he acted, but my learned brothers have come to the conclusion that his discretion was wrongly exercised, and, as I have already said, they also think that there were special circumstances such as to justify an order for taxation, and that therefore, notwithstanding the pendency of an action for the bill of costs, an order for taxation should be

(1) 8 Beav. 224. (2) 8 Beav. 237.

made. As I have said, speaking for myself, I feel some hesitation as to the existence of special circumstances in this case; but, the only limitation with regard to what may constitute such circumstances being that the judge must exercise a judicial discretion in deciding whether there are special circumstances, I am not prepared to differ from my learned brothers on this point.

FARWELL L.J. In my opinion this is simply an ordinary case of an application for taxation under s. 38 of the Solicitors Act, 1843, by a person liable to pay a solicitor's bill of costs, in which, in the absence of any special reason to the contrary, it is a matter of course that the order for taxation should go. We have no clue to the reasons why the learned judge at chambers refused the application; and we must therefore simply deal with the case upon the facts as they appear before us. They are as follows. There was an agreement for the compromise of an action on the terms that the defendants, the appellants in this Court, were to pay the plaintiff's costs in relation to the claim as between solicitor and client. The costs so provided for included not only the costs of the action, but also all costs prior to the action, and costs of the negotiations for the settlement of the action, and the preparation and execution of a deed for giving effect to the compromise. It is clear that the agreement was to pay taxed costs, and accordingly a correspondence took place between the solicitors of the parties with reference to the taxation. On October 9, 1907, the defendants' solicitors wrote to the plaintiff's solicitors asking for a copy of their costs, in order that they might apply for taxation. On October 24 the defendants' solicitors again asked for a copy of the bill, and stated that probably there would have to be a taxation. On the same date the plaintiff's solicitors wrote to the defendants' solicitors offering to shew them the bill and to make them a copy of it on the usual terms, and then the summons for taxation was issued. Notwithstanding that the question of taxation was thus pending, the plaintiff's solicitors obtained payment of the bill of costs; and on November 22, more than three weeks after this correspondence, an action was

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commenced by the plaintiff in the first action upon the agreement for payment of costs, claiming payment of the whole amount of the plaintiff's solicitors' bill of costs without any reference to taxation. The defence to that action admits liability under the agreement, but claims taxation of the bill. The only question between the parties is whether the taxation is to take place under the Solicitors Act, 1843, or in the action. It is contended by the respondents in this Court that, these costs being payable by virtue of an agreement, if there is any dispute as to the construction of the agreement, the taxing Master cannot determine it, and the matter must be decided in an action on the agreement. It may well be that, where the existence of the alleged agreement, or of any liability under it, is in dispute, such a dispute ought to be settled by action. But, where there is an admitted agreement for payment of costs and the only question is as to the true construction of some terms in it, having regard to the circumstances, there it is competent for the taxing Master for the purposes of the taxation to determine that question. The only argument to the contrary is Lord Langdale's judgments in the cases of *In re Thompson* (1) and *In re Rhodes.* (2) It may be observed that neither of those cases is cited in Cordery on Solicitors as an authority for the proposition for which they have been cited to us, and they have not, of late years at any rate, been followed. If authority to the contrary were necessary, I think that it may be found in the recent case of *In re Cohen & Cohen* (3), where, the Master having upon taxation under s. 38 determined the construction of an agreement by a third party to pay costs, an application was made for a review of taxation, upon which the Court dealt with the point as to construction, and it was never suggested that there was no jurisdiction to do so. We have made inquiries as to the practice in this respect, both in the Chancery Division and the King's Bench Division, and are informed that the Masters for years past have always dealt with the construction of agreements to pay costs. It would really, in my opinion, be a very cruel kindness to the parties

(1) 8 Beav. 237. (2) 8 Beav. 224.

(3) [1905] 2 Ch. 137.

in such cases to compel them to have such questions settled by means of an action. For these reasons I think there is nothing in the respondents' contention on this point.

Another point taken was that, the bill having been paid, there must be special circumstances in order to entitle the appellants to taxation, and that there were no such circumstances in the present case. I agree with what Vaughan Williams L.J. has said to the effect that there was in this case no intention in any way to defraud the appellants of their rights, and that it was merely a case of two firms of solicitors playing the game in conformity with what they respectively considered to be the strict rules of the game, but the question is whether those rules have really been observed. In *In re Longbotham & Sons* (1) Romer L.J. said in the course of the argument: "Suppose a client with his eyes open had chosen to pay the solicitors' bill, then, if your contention is well founded, there could not be a taxation at the instance of a third party." I suppose that the Lord Justice by the words "with his eyes open" meant, knowing that taxation of the bill was contemplated, and that his view was that it would be absurd to put forward such a contention, that it would be absurd to say that, where a party has prima facie a right to taxation, and has expressed to the other party his intention to obtain taxation of the bill, he can be deprived of his right because the other party chooses to pay the bill. But, assuming that this consideration would not be sufficient, I think that there are items in this bill which afford sufficient reason why taxation should be ordered, although the bill has been paid. I doubt whether this agreement could be intended to cover costs which, before the compromise, had been already disposed of in the defendants' favour by a final order. Again, I do not at present see how under the agreement the plaintiff could be justified in claiming costs which the judge at chambers had ordered to be borne by the plaintiff herself. The plaintiff may be able hereafter to give some explanation as to this, but I think the inclusion of those items in the bill is a special circumstance sufficient to justify an order for taxation.

(1) [1904] 2 Ch. 152, at p. 155.

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KENNEDY L.J. I agree. I think that there are special circumstances which entitle the appellants to have this bill of costs taxed, notwithstanding the fact that it has been paid by the plaintiff in the original action to her solicitors. That payment was received with knowledge of the fact that the appellants intended to apply for taxation of the bill. If, in a case where a third party is liable to pay a bill of costs, the solicitor obtains payment of the bill without communication with the third party, knowing that he is intending to apply for taxation, although there may be nothing whatever dishonest in his action, I am disposed to think that under such circumstances it is really almost a mere matter of common fairness that the fact of the payment of the bill should not preclude the third party from obtaining taxation of the bill. But, whether this be so or not, I agree that there are in this case special circumstances by reason of the fact that the bill includes certain items which so far call for investigation by the taxing officer as to make it right that there should be a taxation of the bill. It is now well settled that special circumstances are not confined to duress, pressure, overcharge, or fraud; and the discretion of a judge as to what facts constitute "special circumstances" ought not to be overruled except where he has not exercised his discretion judicially. In this case we are free to decide the matter without considering how far we are entitled to overrule a discretion exercised by the judge at chambers, because, so far as I can ascertain, no question of discretion in the matter was ever raised before Ridley J., and he decided on the view which he took of the construction of s. 38 of the Solicitors Act, 1843.

Then it is said that there is an action now pending in which the plaintiff is claiming the whole amount of her solicitors' bill from the appellants, and which therefore involves the determination of the dispute as to whether under the agreement of compromise she is or is not entitled to a complete indemnity as regards costs from the appellants; and it is urged that this action should be allowed to proceed, more particularly because taxation in that action would take place without any risk to the solicitors in the event of one-sixth of the bill being taxed off. Speaking for myself, I do not see that any injustice will be done

if in this case that happens which ordinarily happens where a solicitor or his client has taken a wrong view of his rights. The law has laid down the rule that if one-sixth of the bill is taxed off the solicitor must bear the costs of the taxation; and I do not see that any argument in favour of the respondents' contention arises from the fact that, in the event of charges having been made for which the appellants are not liable, the respondents may run the risk of having to pay the costs of the taxation. It also seems to me that, where an action is commenced after an application for taxation in the ordinary way has been made, it is a matter for consideration whether, though there may be nothing wrong or improper in any way in bringing the action, the object in bringing it may not have been to avoid the ordinary proceeding for taxation under the Solicitors Act, and, if so, whether there is any reason for not ordering such taxation in the ordinary way. It was said further that the Master has no jurisdiction to determine the construction of an agreement for the purposes of taxation where its meaning is in dispute. We have made inquiries as to the practice, and we find that, as must necessarily often be the case, the practice is for the Master to construe such agreements for the purpose of dealing with particular items in bills of costs, just as he has to construe the judgment given by a judge in order to see what the effect of it is with regard to costs. There may no doubt be cases, as for instance of oral agreements, or agreements which have to be gathered from a long correspondence, in which, if there were great difficulty as to the real meaning of the agreement, a judge might direct an issue to be tried, but there is nothing of that kind here. It appears to be the established practice for a taxing Master to construe such agreements as that here in question. In my opinion there are special circumstances calling for taxation in this case, and the agreement is one which can be sufficiently dealt with by the taxing Master; and I cannot, in the circumstances of the case, see that any reason for postponing the ordinary operation of s. 38 in the case of third parties is afforded by the fact that the plaintiff has since the application for taxation chosen to bring an action in which, if there had been no application for taxation in the ordinary

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way, taxation of the bill might no doubt ultimately have been obtained.

Appeal allowed.

Solicitors for appellants: *Corbin, Greener & Cook, for Barber & Co., Harrogate.*

Solicitors for respondents: *William Stubbs, for Hirst & Capes, Harrogate.*

E. L.

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[IN THE COURT OF APPEAL.]

In re MARCHANT.

Practice—Appeal from Chambers—"Practice and Procedure"—Originating Summons—Order directing Defendant, a Solicitor, to Pay Sum of Money to Plaintiff—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An appeal will not lie direct to the Court of Appeal against an order of a judge at chambers made upon an originating summons and directing the defendant, a solicitor, to pay to the plaintiff a sum of money specified in the summons, the matter not being one of practice and procedure within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4.

Such an order is a final, and not an interlocutory, order.

APPLICATION for a stay of execution pending an appeal from the decision of a judge at chambers upon an originating summons.

The summons, which had been taken out by or on behalf of one Robert Frarey, asked for an order that the appellant, a solicitor, should within four days pay to Frarey or his solicitor the sum of 101*l.* 18*s.*, alleged to be due under and in pursuance of a written undertaking, dated July 4, 1906, to indemnify Frarey against any action which might be brought against him; the undertaking was not given in the course of an action. The appellant contended that the undertaking had no application to the particular action in respect of which the money was alleged to be due and payable. The judge in chambers made an order for payment of the sum by the solicitor, who then appealed to the Court of Appeal by special leave of that Court. The present application was for a stay of execution until the appeal had been heard.

Addington Willis, for the respondent. There is a preliminary objection to the hearing of this application. The order made upon the originating summons was an order to pay the money claimed; it was an order which finally determined the rights of the parties, and it cannot from its nature be a matter of practice and procedure within the meaning of s. 1, sub-s. 4, of the Judicature Act, 1894; an appeal from it therefore lies to the Divisional Court, and not to the Court of Appeal. The case is indistinguishable from *Haydon* v. *Cartwright* (1), where an order upon an originating summons, directing a firm of solicitors to deliver a cash account and a list of the moneys and securities which they had in their custody on behalf of the plaintiff, and to bring the latter into Court, was held to be a final order settling the rights of the parties; the order in the present case is equally final, and is practically on the same footing as a judgment in an action. [He also referred to *In re Herbert Reeves & Co.* (2); *Bozson* v. *Altrincham Urban Council.* (3)]

R. V. Bankes, for the appellant. The order made by the judge at chambers was an interlocutory order, and the case in that respect resembles *In re Oddy* (4), where a summons for a review of taxation of a solicitor's bill of costs was held to be a matter of practice and procedure. The appellant, having obtained from the Court of Appeal leave to appeal from an interlocutory order made by a judge, has satisfied the requirements of s. 1, sub-s. 1 (*b*), of the Judicature Act, 1894, and the appeal is in order. Moreover, this is a matter of practice and procedure within s. 1, sub-s. 4, of that Act. The proceeding by originating summons to enforce payment of a sum of money is a summary remedy that could only be adopted in the case of a solicitor, and is a resort to the summary jurisdiction of the Court over its own officer; such a proceeding, although possibly not a matter of practice within the strict meaning of that term, is nevertheless a matter of procedure, and the appeal lies in the first instance to the Court of Appeal.

VAUGHAN WILLIAMS L.J. I am of opinion that the preliminary objection is good, and that this is not a matter of practice and

(1) [1902] W. N. 163.
(2) [1902] 1 Ch. 29.
(3) [1903] 1 K. B. 547.
(4) [1895] 1 Q. B. 392.

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procedure within the meaning of the statute. This question has been the subject of many decisions. Generally speaking, a matter of practice or procedure arises in the course of an action, but I am far from saying that there can be no matter of practice or procedure other than questions so arising; we have not, however, to decide that question, or to draw a line as to what is practice or procedure. The present proceeding was an originating summons, which raised the question whether an order ought to be made upon a solicitor to pay a sum of money. It is plain that the judgment on this originating summons is final, for it is a decision which puts an end to the whole question between the parties whichever way the decision may be; under those circumstances it is prima facie not a matter of practice or procedure. There may be cases in which, although the form of the remedy is an originating summons which raises a question the answer to which will determine finally the question between the parties, yet the proceeding is so intimately connected with a pending action between the same parties as to make it a matter of practice or procedure; but this case is not one of them. There are several decisions more or less in point, to some of which I will briefly refer. First comes *Haydon* v. *Cartwright* (1), to which I myself called attention during the argument, and which seems to be a clear decision in the respondent's favour. Then there is *Watson* v. *Petts* (2), the actual decision in which case, as it appears in the head-note of the report, was that "an application to a judge at chambers for a prohibition to restrain an inferior Court from exceeding its jurisdiction is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal lies to the Divisional Court, and not, in the first instance, to the Court of Appeal." The subject-matter of that case was somewhat different from that of the present case, but A. L. Smith L.J. in the course of his judgment said (3): "The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court, and not a matter in which a county court judge is sought to be prohibited

(1) [1902] W. N. 163. (2) [1899] 1 Q. B. 54.
(3) Ibid. at p. 55.

from exceeding his jurisdiction in his court." It seems to me that in the present case also the question which is raised in what I may call an action commenced in this convenient way by an originating summons is not a matter of practice and procedure in connection with a cause or matter in the High Court. *Long* v. *Great Northern and City Ry. Co.* (1) also raised a question as to what was a matter of practice and procedure within the Judicature Act, 1894, and Collins L.J., after referring to *Watson* v. *Petts* (2), said: "That is exactly the case here. When the application was made to the judge in chambers there was no cause or matter in the High Court to which it could relate. It had reference to a claim raised in an inferior court, as in *Watson* v. *Petts*." (2) The only other matter to which I need refer is the contention of Mr. Bankes that this was a matter of practice and procedure, because it was a proceeding which could not have arisen except in the case of a solicitor defendant. Assuming that to be the case, it does not seem to me to be even suggested that the proceeding was connected with any action between the parties. In my opinion any appeal must lie to the Divisional Court, and not in the first instance to the Court of Appeal.

FARWELL L.J. I agree. The undertaking given by the solicitor was not given in the course of an action, but was an independent undertaking, and an originating summons was taken out in order to enforce a summary remedy against the solicitor by a resort to the summary jurisdiction of the Court against its own officer. If the person giving the undertaking had not been a solicitor, an action must have been brought upon it, and I think that the employment of this summary jurisdiction against a solicitor stands on the same footing as an action against an ordinary person.

Preliminary objection allowed. (3)

Solicitors for appellant: *Dyson, Smith & Marchant.*

Solicitors for respondent: *Newton, Lewin & Levett.*

(1) [1902] 1 K. B. 813.

(2) [1899] 1 Q. B. 54.

(3) The Court extended the time for appealing in order to enable the appellant to take the necessary steps to appeal to the Divisional Court.

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[IN THE COURT OF APPEAL.]

EDWARDS *v.* MALLAN.

Practice—Remittal of Action to County Court—Action of Tort—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.

The plaintiff in an action in the High Court alleged in the statement of claim that she employed the defendant, a dentist, for reward to extract a tooth by his painless process, but that the tooth was so unskilfully extracted that portions of it were left in the plaintiff's jaw, whereby illness, pain, and suffering were caused to her:—

Held, that the action was an action of tort within the meaning of s. 66 of the County Courts Act, 1888, and might be remitted to the county court under that section on the ground that the plaintiff had no visible means of paying the defendant's costs should a verdict not be found for the plaintiff.

Appeal of the plaintiff from an order of Jelf J. at chambers. The material paragraphs of the statement of claim were as follows:—"(1.) The plaintiff has suffered damage from the negligence and unskilfulness of the defendant as a surgeon dentist employed for reward by the plaintiff to extract one of her teeth. (2.) The plaintiff in February, 1907, was suffering from toothache, and went to the defendant to have a tooth extracted by the defendant's 'painless process,' and on February 18 the defendant or his operator or other representative agent did extract the said tooth, but so unskilfully that broken portions of the said tooth were left in the jaw, whereby illness, pain, and suffering were caused to the plaintiff." The defendant, who in his defence denied all the allegations in the statement of claim, took out a summons under s. 66 of the County Courts Act, 1888 (1), to have the action remitted to a county court on the

(1) Sect. 66 of the County Courts Act, 1888, provides that: "It shall be lawful for any person against whom an action of tort is brought in the High Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the High Court shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the Supreme Court, or satisfy a judge of the High Court that he has a cause of action fit to be prosecuted in the High

ground that the plaintiff had no visible means, if unsuccessful, of paying the defendant's costs, and an order was made by a Master and affirmed by Jelf J. that, unless the plaintiff within seven days gave security for costs, the action should be remitted to the county court. The plaintiff appealed.

R. V. Wynne, for the plaintiff. The order was wrong. The action is one of contract and not of tort, and cannot be remitted to a county court under s. 66. The statement of claim alleges an employment of the defendant "for reward," which shews that the action is founded upon a contract by the defendant to employ a painless process in the extraction of the plaintiff's tooth, and a clear breach of that contract is alleged; the claim is not merely in form, but also in substance, a claim in contract. *Brown* v. *Boorman* (1) is an authority for the proposition that whenever there is a contract of employment, and something is to be done in the course of that employment, if there is a breach of duty in the course of the employment, the party injured has a remedy either in contract or in tort; that case is in point here, and the plaintiff has chosen to frame her remedy in contract, as she was entitled to do. The cases of *Turner* v. *Stallibrass* (2) and *Sachs* v. *Henderson* (3) will be relied on for the defendant, but when examined they will be found to be not in point. In the former an action founded on the common law liability of a bailee and in the latter an action by a tenant against his landlord for the wrongful removal of fixtures were held to be founded on tort within the meaning of s. 116 of the County Courts Act, 1888, which deals with the costs of actions brought in the High Court which could have been commenced in a county court. Neither decision touches s. 66, and it is manifest that different considerations may apply in determining whether an action is one of tort for the purposes of a section dealing with proceedings before the trial or of a section dealing with the costs after the trial is over.

Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give security, or failing to satisfy a judge as aforesaid, that the action be remitted for trial before a court to be named in the order . . . ."

(1) (1844) 11 Cl. & F. 1.

(2) [1898] 1 Q. B. 56.

(3) [1902] 1 K. B. 612.

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Harney, for the defendant. The action is in substance one of tort within the meaning of s. 66. It is not necessary for the plaintiff to rely upon a contract in order to maintain the action; she does not allege that there was any breach of a contract to employ a painless process of extraction; her complaint is that the extraction was so unskilfully done that, although it may have been painless in itself, it was followed by consequences causing illness, pain, and suffering to the plaintiff. That is the substance of the action, and it is the substance and not the form of the action which must be looked at: *Bryant* v. *Herbert* (1); *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2); and this is made still more clear in *Turner* v. *Stallibrass*. (3) The relation of the plaintiff and defendant was such that a duty to take due care arose from that relationship, irrespective of contract; and, the defendant having been negligent in the performance of his duty, the action is one of tort. [He also cited *Kelly* v. *Metropolitan Ry. Co.* (4); *Steljes* v. *Ingram*. (5)]

R. V. Wynne in reply.

VAUGHAN WILLIAMS L.J. In my opinion Jelf J. was perfectly right in treating this action as an action of tort; the appeal therefore fails. There is very little, if any, difference between the parties as to what I may call the facts of the case. It is agreed that for the purposes of s. 66 we must ask ourselves whether in substance the action is one of tort or of contract, and I think that the authorities afford us a guide by which we can arrive at a proper conclusion on that point. Sect. 66 deals with proceedings that happen before the trial of the action, and when we are considering whether the action is one of tort for the purposes of that section we must have regard to the statement of claim; after trial of an action in the High Court, when the question of costs arises under s. 116 of the County Courts Act, 1888, we may have regard to other matters in determining whether it is an action of contract or tort, and (inter alia) to the way in which the trial was conducted. Looking at the statement of claim in the present action, there is no doubt an averment in

(1) (1878) 3 C. P. D. 389.
(2) [1895] 1 Q. B. 134, at p. 138.
(3) [1898] 1 Q. B. 56.
(4) [1895] 1 Q. B. 944.
(5) (1903) 19 Times L. R. 534.

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paragraph 2 amounting to an allegation of a special contract by the defendant to employ his painless process of extraction, which leaves it possible that the plaintiff might have gone on to complain of a breach of the contract to employ his painless process. But when we go on to the rest of the statement of claim we find no complaint of non-user of the painless process or of damage arising to the plaintiff by reason of the non-user. I agree with what was said by Farwell L.J. in the course of the argument—that the expression "painless process" means a process which will be painless in the course of the extraction of the teeth, and does not mean a process which will free the patient from suffering any pain after the extraction. It is sufficient, however, to say that there is no allegation of a breach of a contract to use a painless process. The statement of claim goes on to allege that the tooth was so unskilfully extracted that broken portions of it were left in the plaintiff's jaw, causing illness, pain, and suffering to her. In my judgment it is right to treat this action simply as an action against the defendant for having so unskilfully performed his duty as a dentist that broken portions of the tooth were left in the plaintiff's jaw and caused pain and suffering. If that is the proper view to take of the statement of claim, the learned judge was quite right in remitting the case to the county court, if he thought fit so to exercise his discretion. As I understand the law, if there is either a special contract or an implied contract arising from the relation of dentist and patient, and an action is brought upon the contract for a breach of duty arising out of that relation, then, in either case, if the plaintiff substantially does not rely upon any special term in the special contract, and only relies (so far as the implied contract is concerned) upon a contract the implication of which depends solely upon the relation of dentist and patient, in neither case would it be right that the action should necessarily be treated as one of contract.

FARWELL L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Mullens, Bosanquet & Howard.*
Solicitor for defendant: *Joseph Davis.*

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Feb. 28;
March 2, 16.

[IN THE COURT OF APPEAL.]

BRITISH CASH AND PARCEL CONVEYORS, LIMITED *v.* LAMSON STORE SERVICE COMPANY, LIMITED.

Maintenance of Suit—Common Interest—Trade Rivals—Protection of Customers—Contract of Indemnity.

The plaintiffs and the defendants were rival manufacturers of an apparatus for conveying cash from one part of business premises to another. The defendants obtained contracts for the hire of their apparatus from three of the plaintiffs' customers, who were under contract to use the plaintiffs' apparatus at the time, and they agreed to indemnify the customers against any claims by the plaintiffs against them for breach of contract. Two of these customers were originally customers of the defendants, and the third gave a contract to the plaintiffs in the belief that he was dealing with the defendants. The plaintiffs in each case sued the customer for breach of contract and in two instances recovered damages and costs, which the defendants paid under their contract of indemnity. The plaintiffs claimed relief against the defendants on the ground of maintenance:—

Held, that the defendants in giving these contracts of indemnity were acting in the legitimate defence of their commercial interests and were not liable for maintenance.

Application by the defendants for judgment or a new trial.

The plaintiffs and the defendants were trade rivals, each having a special apparatus for carrying cash from one part of business premises to another. The plaintiffs by their action claimed relief, first, on the ground that the defendants had wrongfully induced certain of the plaintiffs' customers to break their contracts, and, secondly, on the ground of maintenance. As regards the first claim the learned judge ruled that there was no case to go to the jury, and there was no appeal as to that. The second claim was founded on three distinct cases—(1.) Reese & Gwillim; (2.) Whiteman; (3.) Harper Brothers.

In the first case Reese & Gwillim, of Cardiff, had originally hired the defendants' apparatus for a term of ten years, which expired in 1905, and by the terms of the contract they were bound not to discontinue the use of that apparatus without the defendants' consent until the expiration of the term. During the currency of this contract the plaintiffs obtained from

Reese & Gwillim a contract dated July 26, 1904, for the hire of the plaintiffs' apparatus for a term of five years at a certain rental. The plaintiffs were aware that the firm were then using the defendants' apparatus, and they undertook to take it down and to allow off the first year's rental a sum of 62*s.* still due to the defendants under their contract. The plaintiffs' apparatus proved unsatisfactory. Reese & Gwillim made several complaints to the plaintiffs about it and ultimately requested them to remove it. They then communicated with the defendants. On March 22, 1905, the defendants' manager wrote in reply: "I will be prepared to put in our system and take risk of any action they" (the plaintiffs) "may bring against you." On May 22, 1905, the defendants' manager again wrote as follows: "I agree to put in three or four stations of our best rapid wire cash railway at a rental of 45*s.* per station per annum. I also agree to take all risk of any loss by you re the cash railway you are at present using, and if any action by the B. C. & P. Co. I will stand behind you in that action and will make good any loss." Reese & Gwillim asserted that they were entitled to treat their contract with the plaintiffs as at an end by reason of the complete breakdown of the plaintiffs' apparatus. The plaintiffs, on the other hand, claimed four years' rent, amounting to 21*l.*, as still due to them. On October 7, 1905, the plaintiffs brought an action against Reese & Gwillim, who counter-claimed. The plaintiffs, on March 26, 1906, discontinued their action and paid 40*s.* damages in respect of the counter-claim and 3*l.* costs.

In the second case Whiteman, of Derby, had a running contract dated June 10, 1901, with the defendants for their apparatus, which contract did not expire until June, 1906, and this contract also contained a covenant against discontinuing the use of the defendants' apparatus during the term. The plaintiffs procured from Whiteman a contract in February, 1905, for the erection of their apparatus. Disputes arose as to the removal of the defendants' apparatus, and Whiteman desired to have the defendants' apparatus instead of the plaintiffs'. Litigation was threatened by the plaintiffs against Whiteman. On April 8, 1905, the defendants' superintendent wrote to Whiteman as follows: "I think your solicitor's suggestion should be followed and that you should

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defend any action the B. C. Co. may take, as you know in my opinion the whole business was a rush, especially as they knew you had a contract with the Lamson Company, and I am prepared to personally pay the amount of judgment and costs whatever they may be." A county court summons was served on Whiteman on April 17, the plaintiffs claiming 15*l.* as loss of profit. Whiteman paid 5*l.* 10*s.* into Court with a denial of liability and counter-claimed for rescission of the agreement on the ground of misrepresentation. The plaintiffs recovered 7*l.* damages in the action and the counter-claim was dismissed. The defendants, pursuant to their indemnity, repaid the amount of the judgment and costs, namely, 23*l.* 9*s.* 11*d.*

The third case related to Harper Brothers, of Balham. The defendants' traveller called upon the firm, but did not obtain an order. A day or two afterwards the plaintiffs' traveller called and obtained an order. Harper Brothers alleged that they had been deceived and thought that they were giving the order to the defendants and not to the plaintiffs, and they asserted that the agreement obtained by the plaintiffs' traveller was void and declined to allow the plaintiffs to put up their apparatus. The defendants' traveller then called again and obtained a contract, and he undertook personally to indemnify Harper Brothers against any claim which might be made by the plaintiffs in respect of the contract with them. Ultimately the plaintiffs brought an action in the county court against the firm which was settled for 7*l.* (5*l.* damages and 2*l.* costs), which was paid by the defendants.

This action was tried before Ridley J. and a special jury. The learned judge held that what the defendants had done in these three cases amounted to maintenance as a matter of law and directed the jury to find a verdict for the plaintiffs, and he ordered judgment to be entered for the plaintiffs for 40*s.*, and granted an injunction restraining the defendants "from unlawfully upholding or maintaining any actions, suits, or other legal proceedings between the plaintiffs and any other person or persons."

Arthur Powell, K.C., and *Cecil Walsh*, for the defendants. The learned judge was wrong in holding that the acts comp.

of constituted maintenance. The defendants, in giving indemnities to their customers, were simply defending their own commercial interests, and that is a sufficient ground to justify them in maintaining another in a lawsuit: *Plating Co.* v. *Farquharson* (1); *Holden* v. *Thompson.* (2) Even if the defendants had no such interest as would justify them in supporting these actions, yet if they had a bona fide belief that they had such an interest, that is sufficient: *Findon* v. *Parker.* (3) No action will lie for maintenance unless the acts relied on are maintenance within the criminal law: *Metropolitan Bank* v. *Pooley* (4); but a contract of indemnity against loss does not necessarily imply litigation and it does not become bad in the sense of being criminal because litigation afterwards ensues. Maintenance is defined in Stephen's Digest, art. 156, as "the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest or in which he acts from any improper motive," and in a note to this article the learned author speaks of maintenance and the kindred offence of barratry as "relics of an age when Courts of justice were liable to intimidation by the rich and powerful and their dependants." According to that definition it is not maintenance to maintain a defendant, and all the cases here complained of are cases of maintaining defences. Since the time of the Plantagenets no instance can be found of a conviction for maintaining a defence. At any rate aiding a defendant to resist a claim which the result shews was not a just claim or was excessive is not maintenance, because it is not a hindrance of justice and right, which is a necessary element in the crime of maintenance. Further, agreeing to indemnify a man against the costs of defending an action which he intended to defend in any event is not maintenance, because it is essential to the offence of maintenance that it should tend to promote unnecessary litigation: *Fischer* v. *Kamala Naicker* (5); and that case also shews that there can be no maintenance without a bad motive. Lastly, a limited company cannot be held guilty of the offence of maintenance, and therefore no civil action will lie against it:

(1) (1881) 17 Ch. D. 49.
(2) [1907] 2 K. B. 489.
(3) (1843) 11 M. & W. 675.
(4) (1885) 10 App. Cas. 210, 218.
(5) (1860) 8 Moo. Ind. App. 170, 187.

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Metropolitan Bank v. *Pooley*. (1) Even assuming that there has been technically maintenance, no action will lie in the absence of special legal damage. There is no authority on this point, because no case can be found in which special damage has not been claimed, and therefore the point has never arisen, but this view is supported by Sir F. Pollock in his Law of Torts, 8th ed. p. 334.

Shearman, K.C., and *Herbert Jacobs*, for the plaintiffs. The law of maintenance is founded on public policy, and it is contrary to public policy that a trade rival should be allowed to invite the customers of another to break their contracts under a promise of indemnity. The defendants in maintaining defences to actions which the plaintiffs were bringing against their customers for breach of contract had no proper and legitimate interest in the subject-matter of those actions sufficient to justify their interference. Any person who interests himself for either plaintiff or defendant in upholding litigation in which he has no legal interest is guilty of maintenance unless he can bring himself within certain recognized exceptions, and this case is not within any of those exceptions: *Alabaster* v. *Harness* (2); *Bradlaugh* v. *Newdegate*. (3) That maintenance applies to defences is to be inferred from *Holden* v. *Thompson* (4), where it was a defence which was alleged to be maintained, yet, although the action failed on other grounds, nobody took the objection that there could not be maintenance of a defence. In order to justify maintenance on the ground of common interest there must be a legal interest in the subject-matter of the action or in some issue therein: *Alabaster* v. *Harness* (2); *Hutley* v. *Hutley* (5); *Guy* v. *Churchill*. (6) It is said that a reasonable belief in a legal interest will justify maintenance, but it must be a reasonable belief in facts which if they existed would give an interest; it must not be a fancied interest: per Lord Esher in *Alabaster* v. *Harness*. (7) With regard to the question whether a limited company can be made liable in a civil action for maintenance,

(1) 10 App. Cas. 210, 218.
(2) [1894] 2 Q. B. 897; [1895] 1 Q. B. 339.
(3) (1883) 11 Q. B. D. 1.
(4) [1907] 2 K. B. 489.
(5) (1873) L. R. 8 Q. B. 112.
(6) (1888) 40 Ch. D. 481.
(7) [1895] 1 Q. B. 339, at p. 343.

the dictum of Lord Selborne in *Metropolitan Bank* v. *Pooley* (1) is limited to a company in liquidation, and, whatever may be the effect of that dictum, it is no answer to an action for maintenance against a company to say that a company cannot be guilty of a crime because maintenance was a common law wrong giving rise to a civil action before it was made by statute a criminal offence: Hawkins' Pleas of the Crown, book 1, c. 27, tit. "Maintenance," ss. 38-40. It is now established that a civil action will lie against a limited company for acts involving malice, such as malicious prosecution and libel: *Cornford* v. *Carlton Bank, Ld.* (2); *Citizens' Life Assurance Co., Ld.* v. *Brown.* (3) Moreover, a mens rea is not requisite to the crime of maintenance: per Rigby L.J. in *Alabaster* v. *Harness* (4); and all the judgments in that case shew that mere honesty of motive is not a sufficient defence to an action for maintenance. Further, the character of the act does not depend upon the result of the action maintained; otherwise one could never discover whether a person was guilty of maintenance until the action was tried out. Lastly, special damage is not necessary to support an action of this kind. This is analogous to the case of *Exchange Telegraph Co., Ld.* v. *Gregory & Co.* (5)

[COZENS-HARDY M.R. intimated that notice would be given to counsel if a reply was required.]

March 16. COZENS-HARDY M.R., after stating the facts substantially as above stated and observing that in each of the three cases the indemnity or guarantee was given to a customer, continued as follows:—It was scarcely attempted to support the injunction, and I think it is plain that it cannot be supported. No threat or intent to maintain in future litigation is even alleged, and there may be actions between the plaintiffs and other persons in which the defendants have such an interest as would clearly justify them in supporting such persons in defending those actions.

Apart from the injunction, we have had a very learned argument

(1) 10 App. Cas. at p. 218.
(2) [1900] 1 Q. B. 22.
(3) [1904] A. C. 423.
(4) [1895] 1 Q. B. 339, at p. 345.
(5) [1896] 1 Q. B. 147.

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in support of the view that the conduct of the defendants in the three instances I have described gave the plaintiffs a common law action for maintenance. I am unable to accept this contention. Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of law. The law has been modified in accordance with modern ideas of propriety. The language of Lord Abinger in *Findon* v. *Parker* (1) is explicit(2): "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purposes of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." And in the sixty-five years which have elapsed since *Findon* v. *Parker* (1) this principle has been carried even further. I may refer also to *Fitzroy* v. *Cave*. (3) It is common knowledge that contracts of indemnity are recognized and unquestionably valid, and none the less because they may involve and indeed contemplate the institution or the defence of an action. The whole business of marine insurance depends upon this. And perhaps the familiar insurances against claims under the Workmen's Compensation Act are a still better example. In my opinion all that was done by the defendants falls under and is protected by this principle. The defendants had a business interest, a commercial interest, which fully justified the indemnities or guarantees which they gave. And on this short ground I think the appeal must be allowed, and judgment entered for the defendants.

In the view which I take it is not necessary to consider whether there are not other grounds on which the appellants ought to succeed. I refer especially to the arguments that an action for maintenance cannot be supported against a corporation, and that no such action can be supported without proof of special damage. On each of these points I desire to keep an open mind.

FLETCHER MOULTON L.J. In this case we have listened to a long argument on behalf of the appellants on the question

(1) 11 M. & W. 675. (2) Ibid. at p. 682.
(3) [1905] 2 K. B. 364.

of what constitutes maintenance in the eye of the law. This is a difficult question on which, in my opinion, the authorities are far from being in harmony. The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the Courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. As pointed out by the present Master of the Rolls in *Fitzroy* v. *Cave* (1), the purchase of a chose in action amounted to maintenance in the olden times, and therefore was not only a civil wrong, but a crime. Yet for hundreds of years such transactions have been held valid, and the rights arising out of them have been enforced by the Courts of Equity and are now enforceable in all the Courts of the realm. Similarly in olden times it was maintenance to give evidence without being subpœnaed so to do. To-day it is looked upon as part of the duty of citizens to be ready and willing to assist the administration of justice by giving evidence when they can do so usefully. In the presence of changes such as these it appears to me to be idle to look upon the Courts as administering the old common law as to maintenance. The present legal doctrine of maintenance is due to an attempt on the part of the Courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. The position of the Courts in this respect is not unlike that which may be observed in their treatment of contracts in restraint of trade, though the change of view with regard to maintenance is far more complete. Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made

(1) [1905] 2 K. B. 364.

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serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the Court, and it is impossible to be certain that there are not many other exceptions which have equal validity. A good example of this is given by the case of *Holden* v. *Thompson* (1), in which Phillimore and Bray JJ., rightly in my opinion, accepted the interest arising from community of religion as adequate justification for a man assisting a co-religionist in a dispute relating to religious matters, although such an exception is not made, so far as I know, in any of the attempted definitions of maintenance. That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance. One point is clear. No transaction can constitute maintenance if the Court treats it as valid and enforces obligations under it. Maintenance is certainly a turpis causa, and therefore a contract of maintenance is incapable of being enforced, and if, as in the present case, it is clear from the settled practice of the Courts that the contracts are valid and enforceable, we may feel satisfied that they do not infringe the law against maintenance.

Before dealing specifically with the facts I would wish to make a few general remarks about contracts of indemnity. Such contracts are well known to the law and in no way offensive to it. They are of the most varied kinds. Sometimes, as in the case of fire insurance or the ordinary forms of marine insurance, the indemnity is against the accidents of life. But frequently the insurance is against claims which may be made by third parties. The whole of the contracts of insurance of employers against claims by employees under the Employers' Liability Act and the

(1) [1907] 2 K. B. 489.

Workmen's Compensation Act are of this kind, and so far from such contracts being illegal or tainted with any invalidity, the Courts are continually engaged in giving effect to them by deciding actions admittedly brought or defended by the insurance companies in the names of the insured. Marine insurances against claims arising out of collisions furnish another example. Contracts of re-insurance afford another example. These instances by no means exhaust the types of contracts of indemnity against claims made by third persons. Nothing is more common than that contractors putting up machinery or carrying out engineering works should indemnify the persons employing them against claims for nuisance or trespass in connection therewith. (1) Indemnities against losses or claims arising out of the misbehaviour of servants or employees form a recognized branch of business. Indeed it would be idle to attempt a complete enumeration of all the varied types of contracts of indemnity against claims by third persons, and, unless there is something improper in the nature of such a contract arising out of the circumstances attending its origin, the Courts have never shewn any disapprobation of such contracts or any disinclination to enforce them. The present case arises from the defendants having entered into three such contracts of indemnity under circumstances which I shall now proceed to consider.

[The Lord Justice stated the facts as to the indemnity given in the first case, and continued:—] In requiring such an indemnity Messrs. Reese & Gwillim acted with commendable prudence, and in giving it the defendants were only doing that which was advisable from the point of view of their own business interests. Neither the one party nor the other in so doing was entering into any engagement to which any valid legal objection could possibly be raised. To say that a tradesman is to submit to the loss of a customer because of threats by a rival of bringing unfounded claims against that customer, and that he may not legitimately extend his business by indemnifying the customer who is desirous to employ him, is to my mind ridiculous. I am

(1) For several years it has been common in publishers' agreements for the author (in effect) to warrant the book free from libellous matter. —F. P.

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therefore of opinion that this contract of indemnity was properly entered into by the defendants and binding upon them. The sequel to these events was as follows: The plaintiffs brought an action against Messrs. Reese & Gwillim for breach of contract and carried it on almost up to trial and then abandoned it. In that action Messrs. Reese & Gwillim raised a counter-claim against the plaintiffs on account of their failure to perform their contract and recovered 5*l*. It is therefore clear that the claims of the plaintiffs to have a right to object to the defendants setting up their apparatus on Messrs. Reese & Gwillim's premises were unfounded. [The Lord Justice then stated the facts relating to the indemnity in the second case, and continued:—] I can see no objection to such a proceeding on the part of either the defendants or Whiteman. In the legitimate defence of their own business interests the defendants were entitled to give such an indemnity, and the letters shew that if the plaintiffs had not been unreasonable no action need have ensued. A liberal offer was made to settle any claim they might have under the circumstances, but it was refused, and an action was brought in the county court against Whiteman, in which Whiteman counter-claimed on the ground that the contract had been induced by the plaintiffs' misrepresentation. In the result the plaintiffs succeeded in recovering a sum of 7*l*. (which was less than had been offered to them before the action), and the counter-claim raised by Whiteman was dismissed by reason of the learned judge adopting an interpretation of the contract with the defendants which I cannot follow, but which it is unnecessary to discuss here. [The Lord Justice then stated the facts as to the indemnity in the third case, and continued:—] In this case also I can see no possible objection to the defendants giving such an indemnity. Whether the plaintiffs would have succeeded in establishing their claim had the action been fought out we have no means of judging, nor is it material. The defendants undertook to satisfy the claim and probably thought it wiser to pay something rather than incur the costs of fighting the action.

In each of these cases, therefore, we find a proper contract of indemnity entered into by the defendants not wantonly or officiously, but in the reasonable defence of their own trade

interests. As I have said, such contracts of indemnity are in no wise contrary to law or tainted with invalidity. They do not necessarily involve any action, for a claim may be settled by an adequate offer being made and accepted, and an action becomes necessary only in case the parties do not agree, a state of things which may be due to the unreasonable conduct of the one or the other party or of mistaken views of law or fact on their part which prevent an agreement being arrived at. But so soon as one has come to the conclusion that the contracts of indemnity were not improperly given and were therefore valid and binding on the defendants all question of maintenance vanishes, because under those valid contracts the defendants had a direct personal and pecuniary interest in the defence of the action and indeed could have been made quasi parties to those actions by the third party procedure which is specially framed to meet such cases. To support the charge of maintenance it is necessary for the plaintiffs to establish that these contracts of indemnity against possible claims were invalid and unenforceable. The sole ground for suggesting that these contracts were invalid is that in the absence of agreement claims must be enforced by actions, and that consequently an indemnity against claims by a third party may compel the party giving the indemnity to bear the costs of such action—an argument which, if sound, would render invalid every contract of indemnity against claims by third parties.

The course taken by the judge at the trial was a most unusual one. The trial was by a judge and a special jury, and on the defendants' case being closed the learned judge directed judgment to be entered for the plaintiffs for 40*s.* and granted an injunction which is in the following form: "And that the defendants . . . . their agents and servants be and they are hereby restrained from unlawfully upholding and maintaining any actions, suits, or other legal proceedings between the plaintiffs and any other person or persons."

It is due to the counsel for the plaintiffs to say that before this Court they did not attempt to defend the injunction as thus drawn up. But I can see no justification for any portion of the judgment directed by the learned judge. For the reasons I

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have above given there was in my opinion no evidence whatever of maintenance by the defendants, and even if there had been any such evidence the judge clearly had no authority to withdraw the case from the jury and direct judgment for the plaintiffs either for 40*s.* or for any other sum. Moreover, there was no pretence of any evidence that the defendants threatened or intended to commit any unlawful acts in the future. The three cases of alleged maintenance were isolated cases, each occurring under different circumstances and not indicating any practice or any intention or probability of the defendants doing the like in the future under circumstances which would entitle the plaintiffs to any relief. And even if the judge thought there was some evidence of the kind, the defendants were at all events entitled to have the opinion of the jury as to whether it was proved that they threatened and intended to do unlawful acts before the injunction could be granted.

I am therefore of opinion that the verdict and judgment should be set aside, that the action should stand dismissed, and that the defendants should have the costs of the action and of the appeal, with certificate for a special jury.

BUCKLEY L.J. The plaintiffs in this case brought their action alleging, first, that the defendants maliciously and wrongfully and with intent to injure the plaintiffs induced persons who had contracted with the plaintiffs to refuse to perform their contracts, and that the defendants conspired for those purposes, and claiming special damages, and alleging, secondly, that the defendants were guilty of maintenance, and claiming damages and an injunction under that head. Upon the first of those two heads the plaintiffs made no case. The trial went on upon the second head alone, namely, that of maintenance, with the result that the learned judge directed the jury to give nominal damages and awarded an injunction in the terms which have been read by the Master of the Rolls. Nobody contends that the injunction can be supported in that form. The question that has been argued before us has been whether the defendants were guilty of maintenance, and, if so, whether the plaintiffs are entitled to any and what relief.

The respondents' counsel have sought to argue the general question whether, if it had been shewn that the defendants had sought to make what is commonly called a corner, that they had unfairly attempted to obtain a monopoly in the trade, and with that view had by improper means procured contractors with the plaintiffs to break their contracts, and as part of that scheme had bound themselves to indemnify the contractors from any consequences resulting to them from so doing, there would have been a right to relief. This Court, in *National Phonograph Co., Ld.* v. *Edison Bell Consolidated Phonograph Co., Ld.* (1), recently held that under certain circumstances there is a right to relief by way of injunction to restrain a defendant from procuring a person who has contracted with a plaintiff to break his contract. If such a case were made out, it does not follow from anything which I am saying in this case that there might not be also a remedy in respect of maintenance, if maintenance were proved. But I do say that no such question arises in this case. The first head above stated broke down ; no damage under that head in the facts of this case is or can be claimed. The only question for decision is whether an indemnity against the consequences of an action given under such circumstances as are here proved is maintenance.

The question as to what constitutes maintenance is so fully discussed in *Bradlaugh* v. *Newdegate* (2) and *Alabaster* v. *Harness* (3) that it is unnecessary to do more than refer to those judgments and to collect for the purposes of what I have to say the definitions which have by different authorities been given of that which constitutes maintenance. Blackstone calls it "an officious intermeddling in a suit which no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it" : Blackstone, Commentaries, book 4, ch. 10, s. 12. "Maintenance," says Lord Coke, "signifieth in law a taking in hand, bearing up or upholding of a quarrel or side, to the disturbance or hindrance of common right": Co. Litt. 368 b. The definition in Termes de la Ley is, "Maintenance is, when any man gives or delivers to another, that is

(1) [1908] 1 Ch. 335.
(2) 11 Q. B. D. 1.
(3) [1894] 2 Q. B. 897 ; [1895] 1 Q. B. 339.

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plaintiff or defendant in any action, any sum of money or other thing, to maintain his plea, or takes great pains for him when he hath nothing therewith to do." Chancellor Kent says that it is "a principle common to the laws of all well-governed countries, that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce": Kent on American Law, part 6, lect. 67. While W. W. Story says: "Maintenance is the officious assistance by money or otherwise, proposed by a third person to either party to a suit in which he himself has no legal interest, to enable them to prosecute or defend it": Story on Contracts, 4th ed. ch. xix. s. 578. All these are quoted by Lord Coleridge in *Bradlaugh* v. *Newdegate*. (1) Sir John Coleridge, in the Privy Council, in *Fischer* v. *Kamala Naicker* (2), says that maintenance "must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary." There are two quotations which may be given from Lord Abinger—the one in *Prosser* v. *Edmonds* (3), "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce"; and the other in *Findon* v. *Parker* (4), where he says, "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." The cases, I think, divide themselves into two classes—the one where the person accused of maintenance has a common interest with the party to the litigation (an instance of which is *Plating Co.* v. *Farquharson* (5)), and the other where the party charged with maintenance has no such interest, in which case he is guilty of maintenance unless his case falls within certain exceptions which

(1) 11 Q. B. D. 1.
(2) 8 Moo. Ind. App. 170, at p. 187.
(3) (1835) 1 Y. & C. Ex. 481, at p. 497.
(4) 11 M. & W. 675, at p. 682.
(5) 17 Ch. D. 49; see p. 54.

have from early times been specifically allowed. The respondents pressed us with an argument which I think was fallacious, that the party accused of maintenance is guilty of an offence unless he falls within some one of these exceptions, relying for that purpose upon the judgment of Lord Esher in *Alabaster* v. *Harness*. (1) The point in *Alabaster* v. *Harness* was that the action as to which the question arose was an action for libel, and Lord Esher commenced his judgment by pointing out that that was a personal action which in point of law concerns only the person who brings it. In other words it was one of the class of cases in which there was no common interest and in which maintenance was established if the case did not fall within one of the specific exceptions. That does not in any way affect the proposition, which I think is true, that it is not maintenance to uphold a party in litigation in whose result the party accused of maintenance has a real and bona fide interest. I do not think it necessary to go in detail into the facts of the present case. The substance of them is that the defendants, being rivals in trade of the plaintiffs, obtained by legitimate means orders from certain persons, accepting the responsibility of litigation if litigation should ensue by reason of the plaintiffs setting up that the order given to the defendants created some right of action by the plaintiffs against the party who gave the defendants their order. The first head of complaint which I indicated at the commencement of this judgment having failed, the plaintiffs cannot say that the defendants had not a bona fide legitimate interest in the protection of their customers in the matter, and, that being so, there was in my judgment no maintenance.

Under these circumstances it is unnecessary to deal with either, first, a contention (a bold contention I think) on the part of the defendants that it is not maintenance to uphold a defendant, nor, secondly, a contention based upon Lord Selborne's words in *Metropolitan Bank* v. *Pooley* (2) to the effect that a corporation cannot be guilty of maintenance. Without resorting to either of those contentions, it seems to me that in the facts of this case maintenance is not established, and consequently the

(1) [1895] 1 Q. B. 339, at p. 343. (2) 10 App. Cas. 210, at p. 218.

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injunction was wrong, and that the order must be discharged and the action be dismissed with costs.

Appeal allowed.

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Solicitors: *W. H. Court; W. H. Newton.*

H. B. H.

[IN THE COURT OF APPEAL.]

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WINANS *v.* THE KING.

March 16, 17.

Revenue—Estate Duty—Foreign Bonds payable to Bearer—Bonds situate in United Kingdom—Marketable Securities—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 2.

Foreign Government and railway bonds payable to bearer and marketable on the Stock Exchange, when physically situate in the United Kingdom at the death of the testator, are liable to estate duty even though the deceased was not a domiciled Englishman.

Attorney-General v. *Glendining*, (1904) 92 L. T. 87, affirmed.

Attorney-General v. *Bouwens*, (1838) 4 M. & W. 171, followed and applied.

THIS was an appeal from a decision of Bray J. which raised the question whether certain foreign bearer bonds, the property of a domiciled American and physically situate in England at the time of the owner's death, were liable to "estate duty" under the Finance Act, 1894.

The question was raised by a petition of right by the executors of the late William Louis Winans, a domiciled American citizen, who died at Brighton in June, 1897, claiming the return of 130,060*l.* in respect of estate duty, to which they alleged their testator's estate was not liable.

The gross value of the property passing on the death of the deceased, brought into account in the affidavit for inland revenue used on proving the will, was sworn at 2,522,005*l.* 17*s.* 1*d.*, and the net value at 2,403,587*l.* 17*s.* 5*d.*, and estate duty to the amount of 192,280*l.* had been paid thereon.

At the time of carrying in the affidavit for inland revenue the executors had included in a separate statement the sum of

1,573,962*l.* 10*s.* 11*d.* as representing the value of the following bonds which were in the Bank of England for safe custody at the time of the testator's death :—

1. New Settlement 3 per cent. bonds of the State of Tennessee, redeemable 1913 . . . $ 60,000
2. North Carolina 4 per cent. bonds, redeemable 1910 $ 10,900
3. City of Cincinnati 6 per cent. stock . . $ 6000
4. North Carolina State stock renewal debt 6 per cent. bonds . . . . . $ 31,000
5. Baltimore and Ohio Railroad 5 per cent. Consolidated Gold Dollar bonds, redeemable 1988 . $ 500,000
6. Baltimore and Ohio Railroad 4½ per cent. Gold bonds, redeemable 1933 . . . . $ 1,250,000
7. Pennsylvania Railroad 4½ per cent. bonds, redeemable 1913 . . . . . $ 1,925,000
8. New York Central and Hudson River Railroad 5 per cent. bonds, redeemable 1904 . $ 1,250,000
9. Russian Government 4 per cent. bonds of 1889. Second series
10. Russian Government 4 per cent. bonds of 1890. Third series
11. German Imperial 3 per cent. loan . Marks 20,000
12. Prussian 3 per cent. consols . . Marks 32,000

All the above were payable to bearer, passed by delivery, and were marketable on the London Stock Exchange. Some of them made mention of a specific property charged as security, and some did not.

The estate duty in respect of these bonds was paid under protest, the executors contending at the time that, as the bonds represented property situate out of the United Kingdom, they were not liable to estate duty.

The amount of the claim was the difference between 192,280*l.*, the duty at 8 per cent. on 2,403,587*l.* 17*s.* 5*d.*, and 62,220*l.*, the duty at 7½ per cent. on 829,625*l.* 6*s.* 6*d.* At the trial before Bray J. evidence was given by members of the Stock Exchange and by American and German lawyers on behalf of the Crown to shew that the bonds were marketable securities in this country,

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capable of being bought and sold by being handed over, and on this evidence,

Bray J., without expressing any opinion of his own, held that the case was covered by the decision in *Attorney-General* v. *Glendining* (1), and accordingly that the bonds were liable to estate duty, and that judgment must be given for the Crown.

The executors appealed. The appeal was heard on March 16 and 17.

At the hearing of the appeal no reference was made to any of the evidence given in the Court below as to the form or negotiability of the bonds, but it was admitted, for the purposes of argument, that the bonds were all bearer bonds passing by delivery, and that they were capable of being dealt with, and were in fact dealt in, for money on the Stock Exchange.

Danckwerts, K.C., *Montague Lush, K.C.*, and *C. Willoughby Williams*, for the appellants. This is really an appeal against the decision in *Attorney-General* v. *Glendining*. (1) As to the nature of these bonds, it seems clear from the dictum of Lord Romilly in *Smith* v. *Weguelin* (2), which was adopted and approved in *Goodwin* v. *Robarts* (3), that the place where the loan was negotiated does not affect the question of law.

Prior to the passing of the Finance Act, 1894, four classes of death duties were in existence—probate duty, legacy duty, succession duty, and account duty, which came into force in 1881. The Finance Act, 1894, imposed the new "estate duty" and practically abolished probate duty and account duty; but there is nothing in the Finance Act, 1894, providing that the new estate duty should be imposed on the same property as probate duty used to be imposed upon: real and personal property is now equally liable to estate duty, and the earlier decisions applicable to probate duty are not applicable to the incidence of estate duty.

Property in this country belonging to a foreigner, even where there is an English executor, is not liable to legacy duty *In re Bruce* (4); *Arnold* v. *Arnold* (5); *Attorney-General* v. *Forbes* (6);

(1) 92 L. T. 87.
(2) (1869) L. R. 8 Eq. 198, at p. 212.
(3) (1876) 1 App. Cas. 476, at p. 495.
(4) (1832) 2 Cr. & J. 436.
(5) (1836) 2 My. & Cr. 256.
(6) (1834) 2 Cl. & F. 48.

Thomson v. *Advocate-General* (1); which shews that the law of the domicil of the testator decides whether his property is liable to legacy duty or not, even in the case of a legacy payable out of real estate: *Chatfield* v. *Barchtoldt.* (2)

In like manner movable property, wherever situate, of a deceased person dying out of the United Kingdom is not liable to succession duty under the Succession Duty Act, 1853: *Wallace* v. *Attorney-General.* (3) The general principle would seem to be that legacy duty and succession duty are imposed on that movable property only which the legatee or the successor claims under or by virtue of the law of this country. That is the limitation placed upon the wording of the Legacy and Succession Duty Acts, as appears from *Wallace* v. *Attorney-General* (3) and the observations of A. L. Smith M.R. in *Attorney-General* v. *Jewish Colonization Association.* (4) And by analogy some similar limit must be placed on s. 1 of the Finance Act, 1894. The words "which passes on the death" in s. 1 of the Finance Act, 1894, must in like manner be limited to what passes on the death by virtue of English law, and as these bonds do not pass by virtue of anything in English law, they are therefore not liable to estate duty. The property situate out of the United Kingdom referred to in s. 2, sub-s. 2, must mean the actual property where situated, and not the mere piece of paper evidencing the property. [Sects. 6 and 8, sub-s. 1, were also referred to.]

In construing the provisions of the Finance Act, 1894, as to the incidence of estate duty, the principles settled by the decisions on the incidence of legacy duty and succession duty cited above ought to be adopted in preference to the arbitrary and unintelligible rules laid down by the decisions on the incidence of probate duty. That these rules depend upon principles that can have no application to estate duty is clear from *Yeoman* v. *Bradshaw* (5); *Attorney-General* v. *Hope* (6); *Attorney-General* v. *Dimond* (7); *Commissioners of Stamps* v. *Hope* (8); *New York Breweries Co.* v. *Attorney-General* (9);

(1) (1845) 12 Cl. & F. 1.
(2) (1872) L. R. 7 Ch. 192.
(3) (1865) L. R. 1 Ch. 1.
(4) [1901] 1 K. B. 123, at p. 132.
(5) (1704) 3 Salk. 70.
(6) (1834) 2 Cl. & F. 84.
(7) (1831) 1 Cr. & J. 356.
(8) [1891] A. C. 476.
(9) [1899] A. C. 62.

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Bacon's Abridgment, 7th ed. vol. 3, p. 457 (E). Assuming that estate duty is not payable, it is possible that probate duty may still be payable, so far as it has not been abrogated by estate duty, but these bonds being mobilia are not liable in the present case to probate duty: *Attorney-General* v. *Higgins* (1); *In the Goods of Ewing* (2); *Laidlay* v. *Lord Advocate* (3); *Pearse* v. *Pearse*. (4)

Having regard to the principles laid down by the cases cited above as to the incidence of legacy and succession duty, *Attorney-General* v. *Bouwens* (5) ought no longer to be followed, though it was followed in *Stern* v. *Reg.* (6); these decisions, however, are not binding on this Court.

[*Lang* v. *Smyth* (7) was also cited.]

Sir W. S. Robson, *A.-G.*, *Sir Robert Finlay*, *K.C.*, and *Vaughan Hawkins*, for the Crown, were not called upon as to the correctness of the decision in *Attorney-General* v. *Bouwens*. (5) The whole case seems to turn on this: Is the property in question situate within the United Kingdom? For s. 1 of the Finance Act, 1894, imposes estate duty on all property within the United Kingdom; therefore, unless the appellants can shew that these bonds are situate outside the United Kingdom, they are liable to estate duty.

[They were stopped.]

COZENS-HARDY M.R. This case is, no doubt, one of importance, and but for the fact that there are authorities which are binding upon us, in the sense that it would not be right for us to interfere with them, I personally should have desired a little more time for consideration before giving judgment; but seventy years ago the case of *Attorney-General* v. *Bouwens* (5) was decided by a very strong Court, consisting, amongst others, of Lord Abinger and Parke B., and that case (which so far as I am aware has never been questioned, has certainly been followed and possibly carried further in the case of *Stern* v. *Reg.* (6)) laid it down in perfectly

(1) (1857) 2 H. & N. 339.
(2) (1881) 6 P. D. 19.
(3) (1890) 15 App. Cas. 468.
(4) (1838) 9 Sim. 430.
(5) (1838) 4 M. & W. 171.
(6) [1896] 1 Q. B. 211.
(7) (1831) 7 Bing. 284.

clear terms that "Probate duty is payable in respect of bonds of foreign Governments, of which a testator dying in this country was the holder at the time of his death and which have come to the hands of the executor in this country; such bonds being marketable securities within this kingdom saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom in order to render the transfer of them valid."

Now starting with that decision—which, of course, may be open to question elsewhere, but which ought not to be questioned by us—I approach the consideration of the Finance Act, 1894, with the conviction that prior to the Finance Act, 1894, probate duty would have been payable in respect of bonds of the nature of those which are in question in the present case, for Mr. Danckwerts has not really attempted to draw any distinction between one or other of these bonds, if we are to assume that *Attorney-General* v. *Bouwens* (1) is good law. That being so, we come to s. 1 of the Finance Act. The words of that section are perfectly general: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called 'estate duty' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

It is a general principle that the statutes of this country affect and have jurisdiction over the subjects of this country, over persons temporarily resident here, and over property situate here, although belonging to foreigners abroad, and the generality of the words used, must be interpreted having regard to that principle. I should therefore assume that, notwithstanding the generality of the words used, property situate out of the jurisdiction would not be affected unless it be the property of a person who is domiciled in this country. But what seems to me to really remove almost all the difficulties in

(1) 4 M. & W. 171.

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this case is s. 2. Sect. 2 defines the meaning of property passing on the death, or at least it says: "It shall be deemed to include the following properties." There may be some other properties coming under the general description, although not under these particular heads. Sub-s. 2 of s. 2 says: "Property passing on the death of the deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." That is to say, property of every kind within the jurisdiction is included within the reach of s. 1, and property situate out of the jurisdiction is only included in the special case mentioned in sub-s. 2 of s. 2.

When you come to consider this with the knowledge that these bonds are, in the view of English law, situate in this country, it seems to me to be impossible to escape from the conclusion that estate duty is payable upon them.

I have not forgotten the very forcible argument which Mr. Danckwerts addressed to us, shewing that the very general words used in the Legacy Duty Act and the Succession Duty Act were narrowed down by construction in this sense—that it was finally established that legacy duty is not payable in the case of a person who is domiciled abroad, and succession duty, notwithstanding the general words, is not payable on legacies which are not subject to legacy duty. In my view, accepting to the full those decisions, and admitting the force of the general observations which Mr. Danckwerts has addressed to us, I find it quite impossible to escape from the language of s. 1 and s. 2, sub-s. 2, and I think the decision of Bray J., following as it did the decision of Phillimore J. in *Attorney-General* v. *Glendining* (1), is perfectly right, and that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. We have here to deal with the case of a foreigner domiciled abroad who died in England. Mr. Danckwerts has convinced me that prior to the passing of the Finance Act, 1894, this portion of his property would have been subject to probate duty, but would

(1) 92 L. T. 87.

not have been subject to either legacy or succession duty. He has further established to my satisfaction that this immunity from legacy and succession duty rests on authoritative decisions, which held that language broad enough to render such property liable to legacy and succession duty must be interpreted in a limited sense sufficient to exempt it from these duties in the case of persons domiciled abroad.

The whole point, therefore, turns upon the language of s. 1 of the Finance Act, 1894, which for the first time imposed "estate duty." This duty certainly took the place of the probate duty in the sense that from the moment that it was imposed probate duty ceased to be levied, and the estate duty (which was a very much heavier duty) became payable out of the whole estate. Mr. Danckwerts argues that we ought to apply the same canons of interpretation to s. 1 of the Finance Act, 1894, as were applied in those cases which established the exemptions from legacy and succession duty. I think that there would have been great force in his argument but for the fact that s. 1 does not stand alone. When I turn to s. 2 to see the definition of "property passing on the death of the deceased"—that is to say, to see what is the property on which estate duty is to be levied—I find that there are words which shew that the framers of that Act were perfectly aware of the difference in the position of personal property which was situated in the United Kingdom at the date of the death of the testator with regard to probate duty on the one hand and legacy and succession duty on the other. And the decision which the Legislature came to was that property which was not subject to legacy or succession duty, should continue to enjoy a like exemption from estate duty provided it was situated out of the United Kingdom. It appears to me to be an irresistible inference that it thereby meant that property which was not subject to legacy or succession duty, but which was at the death of the testator situated in the United Kingdom, should fall under the general words of the statute, and be subject to the newly imposed estate duty.

For these reasons I think that these bonds, which undoubtedly would have been exempt from legacy and succession duty prior to the Act of 1894, but which were physically situate in the United

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Kingdom, do not enjoy exemption with regard to the duty now known as "estate duty," which to some extent, I agree, took the place of the succession duty, but much more substantially represents the old probate duty to which they would have been liable. I therefore come to the same conclusion as the Master of the Rolls.

BUCKLEY L.J. I am of the same opinion, and I can express my reasons in very few words. The Finance Act of 1894 has imposed an estate duty upon all property situate within and, under s. 2, sub-s. 2, upon property situate without the United Kingdom. Mr. Danckwerts did not, and of course could not, dispute that the old probate duty was payable upon property situate in the United Kingdom, and that, upon the principle that inasmuch as you could only recover possession of the property in a Court which had jurisdiction where the property was, it was necessary to shew a title in the plaintiff by presenting an instrument which clothed the plaintiff, according to English law, with a right of dominion over the property.

"Estate duty" has replaced probate duty; it is not the same thing, but the estate duty at any rate includes that which was theretofore probate duty.

The question, therefore, resolves itself into this: "Where was the property situate at the death of the deceased?" It has long ago been laid down that, while a simple contract debt is situate where the debtor is, a specialty debt is where the instrument happens to be.

Lord Field, in giving judgment in the Privy Council in the case of *Commissioners of Stamps* v. *Hope* (1), deals with that. He says as regards the specialty (2): "Inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was 'conspicuous,' i.e., within the jurisdiction within which the specialty was found at the time of death."

Here we have to deal with instruments of indebtedness

(1) [1891] A. C. 476. (2) Ibid. 482.

issued by corporations or bodies of persons resident abroad, in America and elsewhere. They are, however, all bonds to bearer, and are therefore instruments such as that as between a transferor and transferee complete dominion over the property can be effected by the delivery of the instrument from one person to the other. They fall exactly, as it seems to me, within the class of instrument which was dealt with in *Attorney-General* v. *Bouwens* (1), they are marketable within this kingdom, saleable and transferable by delivery only, and no act is necessary out of the kingdom to render the transfer of them valid.

That being so, it only remains to say that *Attorney-General* v. *Bouwens* (1) was decided seventy years ago; that it has never been doubted or disputed since, as far as I am aware; and that I think certainly in this Court we ought to treat that as a valid and binding statement of the law. It seems to me that *Attorney-General* v. *Bouwens* (1) decides the present case. I therefore concur with the Master of the Rolls.

Appeal dismissed.

Solicitors: *Edward H. Quicke, for H. Montague Williams, Brighton; Solicitor of Inland Revenue.*

(1) 4 M. & W. 171.

W. C. D.

C. A.
1908
March 19.

[IN THE COURT OF APPEAL.]

TANNENBAUM & CO. AND OTHERS *v.* HEATH AND ANOTHER.

Practice—Discovery—Ship's Papers—Fire Insurance—Order XXXI., *r.* 12.

The practice with regard to discovery of ship's papers is peculiar to cases of marine insurance, and cannot be extended so as to allow the making of analogous orders for discovery in other cases of insurance.

APPEAL from an order made by Bigham J. at chambers as after mentioned.

The action was brought by L. Tannenbaum & Co. and the Himalaya Mining Company against C. E. Heath and J. S. Follett, as well on their own behalf as on behalf of, and representing, all the underwriters at Lloyd's of a policy of assurance dated July 9, 1906. The claim indorsed on the writ was for a loss upon a policy of fire insurance upon precious stones and other goods.

By the policy, which was in the usual form of a Lloyd's policy, the insurance was expressed to be made for a period therein mentioned by the plaintiffs "as interest may appear, as well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," and to be "30,928*l.* on diamonds, pearls, precious stones, &c., as per attached form, subject to all clauses and conditions of the printed form attached." By the form attached it was stated that, "in consideration of a premium of $1500, this policy covers for not exceeding $150,000 on diamonds, pearls, precious stones, semi-precious and imitation stones and jewelry, mountings, gold and platinum, including patterns, models, and drawings, against the following risks and subject to the following conditions: (1.) The above described property against fire, explosion, and theft, while in the assured's premises, 52, Nassau Street, borough of Manhattan, New York city, covering for the property of the assured or others entrusted to the assured, or for which they may be liable: (2.) against loss or damage from any cause whatsoever of the property of the

assured, while in the charge of any member of the firm, or their salesmen, brokers, agents or messengers, anywhere within the United Kingdom or Canada, also covering when left for safe-keeping by any of the said firm or their salesmen, brokers, agents, or messengers, with any bank, safe deposit company, or in charge of any hotel or customer, or with any person or persons, also while in possession of any one for the purpose of selection or sale: (3.) against all risks of transportation of any property of the assured, or others for which they may be liable, while being shipped to or from the assured, or to and from any salesman or customer of the assured, by registered mail, express or messenger, warranted, however, that on shipments by express not less than $50 will be declared to the express company: (4.) against all risks of transportation on all shipments of the goods of the assured, or goods for which the assured may be liable, between the United Kingdom or Great Britain or continent of Europe and the United States, or vice versa, whether by registered mail, express, purser's bill or bill of lading, or in the possession of a member of the firm or its agents, and it being understood and agreed that this insurance attaches from the time the goods leave the office of the consignor or shipper until they arrive at the office of the assured in New York or any other consignee."

It appeared that the loss in respect of which the action was brought was of precious stones in a store on land through fire.

Upon a summons for directions Bigham J. made an order that before any pleadings were delivered the plaintiffs should file an affidavit of ship's papers within two months, and that inspection should be given within three days afterwards. (1)

F. Newbolt, for the plaintiffs. The order for discovery of ship's papers is peculiar to actions on policies of marine insurance: see Arnould on Marine Insurance, 7th ed. vol. 2, s. 1271, p. 1443. It goes a great deal beyond ordinary discovery. It is

(1) It appeared that the learned judge originally made this order under the impression that the action was on an ordinary Lloyd's policy of marine insurance; but the order was treated in the Court of Appeal as if made for discovery analogous to that provided for by the order for discovery of ship's papers.

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made as a matter of course before pleadings, and is not confined to documents which are, or have been, in the possession or power of the plaintiffs on the record. It is an order for discovery by all parties interested in the insurance, and under it every endeavour must be made to procure the material documents for the purposes of inspection. So far as ordinary discovery is concerned, the plaintiffs are perfectly willing that an order for that should be made before defence, but there is no precedent for an order analogous to the order for discovery of ship's papers in an action on any policy of insurance other than a policy of marine insurance. [He cited *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation* (1); *Schloss Brothers* v. *Stevens* (2); *Henderson* v. *Underwriting and Agency Association* (3); *Harding* v. *Bussell.* (4)]

Scrutton, K.C. (*Maurice Hill* and *R. A. Wright* with him), for the defendants. Clause 4 of the policy in this case contains an insurance of marine risks. In *Henderson* v. *Underwriting and Agency Association* (3) it was held that, where a policy of insurance covered a land transit as well as a marine transit, an order for discovery of ship's papers could not be made. But that decision was questioned, and apparently disapproved of, in *Harding* v. *Bussell.* (4) It would appear, therefore, that the practice in respect of discovery of ship's papers is not absolutely confined to policies of insurance covering marine risks only. All the reasons given for the practice in respect of discovery of ship's papers apply with equal force to a policy like that in the present case. The underwriters know nothing, and have no means of knowledge, concerning the circumstances of the loss, whereas the assured have or can obtain such information; and, the contract of insurance being one in which uberrima fides is required, the plaintiffs and all interested ought to give discovery analogous to that required by the order for discovery of ship's papers. No doubt this kind of discovery has heretofore been generally made in actions on marine policies, but, the principle on which it depends applying with equal force to such a policy as that here in question, it is submitted that the Court has jurisdiction to

(1) [1898] 2 Q. B. 187.
(2) (1905) 10 Com. Cas. 224.
(3) [1891] 1 Q. B. 557.
(4) [1905] 2 K. B. 83.

give similar discovery in the present case. [He cited *Village Main Reef Gold Mining Co.* v. *Stearn.* (1)]

Newbolt, for the plaintiffs, was not called upon to reply.

LORD ALVERSTONE C.J. This appeal raises the question whether in this case an order for discovery analogous to that for discovery of ship's papers should be made. No question of discovery under Order xxxi., r. 12, arises, because the ordinary discovery under that rule has been offered by the plaintiffs before delivery of pleadings, and what the defendants in this case desire to have is something beyond that; they desire to retain that which was given them by the order as regards ship's papers.

In the first place I wish to observe that really no importance should be attached to the fact that this policy was made in the ordinary form of a Lloyd's policy. At the present day it has become usual for underwriters at Lloyd's to insure all sorts of risks other than marine risks, and they frequently use the ordinary form of Lloyd's policy, which was originally framed for marine risks only, for the purposes of such insurances. It was urged that this insurance was made by the plaintiffs for and on behalf of all parties interested. That may become important when finally it becomes necessary to decide by whom ordinary discovery must be given, but that has nothing to do with the present question. With regard to the authorities, I do not think that there is in substance any discrepancy between them. Looking through the cases, it will be seen that the matter has been dealt with by judges of the greatest experience in commercial cases, who do not seem to have had any difficulty or doubt as to the practice in relation to the kind of discovery in question, so far as it affects the present case. In *Henderson* v. *Underwriting and Agency Association* (2) an order for discovery of ship's papers was refused, and an order for ordinary discovery before defence was made. It appears to me that probably it would have been right, according to later authorities, in that case to make an order for discovery of ship's papers, because, the transit covered by the policy being from Cadiz to Alexandretta in Syria, and, therefore, partly by sea and partly by land, the policy covered

(1) (1900) 5 Com. Cas. 246. (2) [1891] 1 Q. B. 557.

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Lord Alverstone C.J.

a marine risk of the character to which the order for discovery of ship's papers is no doubt applicable. In the case of *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation* (1) the only point decided was that, in an action upon a policy of reinsurance in respect of a marine risk, the underwriter of that policy was entitled to discovery of ship's papers. That case is only of importance for the present purpose because the language of Brett L.J. in *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (2) was approved. In that case Brett L.J. laid down the basis of the ordinary practice as to discovery of ship's papers, stating that before the Judicature Acts the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. Then we come to the case of *Village Main Reef Gold Mining Co.* v. *Stearn* (3), which does not touch the present point, because it only followed the decision in *Henderson* v. *Underwriting and Agency Association* (4) as then understood. Then come two cases, which seem to me to be perfectly consistent with one another, and on which I think we ought to act in the present case. The first was *Harding* v. *Bussell.* (5) There the decision in *Henderson* v. *Underwriting and Agency Association* (4) was questioned, and it was held that, where an insurance was substantially a marine insurance, the fact that part of the transit was by land did not affect the right of the defendant to an affidavit of ship's papers. That case is important, because it shews that for this purpose that which has to be looked at is the substance of the claim in the action. Mathew L.J. at the beginning of his judgment called attention to the fact that the policy in that case was in substance a marine policy, although it did cover a short transit by land, from ship to warehouse; and later on, in relation to the contention that, where any part of the transit covered by the insurance was by land, there was no right to an affidavit of ship's papers, he referred to the observations of Lord Esher in *China Transpacific Steamship Co.* v. *Commercial*

(1) [1898] 2 Q. B. 187.
(2) (1881) 8 Q. B. D. 142.
(3) 5 Com. Cas. 246.
(4) [1891] 1 Q. B. 557.
(5) [1905] 2 K. B. 83.

Union Assurance Co. (1) as not justifying any such distinction, and then proceeded to express doubts as to the correctness of *Henderson* v. *Underwriting and Agency Association.* (2) Then came *Schloss Brothers* v. *Stevens* (3), where it was held that an order for an affidavit of ship's papers could not be made in an action brought in respect of a loss upon a policy of insurance on the transit of goods, where the transit was an inland transit, and that it was immaterial that part of the transit was over inland waters. Therefore in these two cases we have converse applications of the principle which governs the practice in this matter. In *Harding* v. *Bussell* (4) discovery of ship's papers was ordered, where the real claim was on a marine insurance, though part of the transit was on land; and in *Schloss Brothers* v. *Stevens* (3) it was refused, where the action was upon an insurance of an inland transit, though part of the transit was on inland waters. In the latter case Mathew L.J. said: "It is clear on the face of the policy that it is a policy for inland transit, and, unless we are to find that, in every case of a policy of insurance for inland transit, there is this right to an affidavit of quasi ship's papers, we cannot deal with this appeal otherwise than by allowing it. The reasons given by Lord Esher, which have been repeated in many judgments, apply strictly to an insurance by sea." The result of the cases appears to me to be that the question which has to be considered, in order to determine whether discovery of this kind can be given, is, What is really the nature of the insurance upon which the action is brought? Here it is not disputed that the action is upon a policy of fire insurance on precious stones on land. It is admitted that the claim was not on clause 4 of the policy, under which there is an insurance on risks of transportation of goods by ship. If the claim had been under that clause I do not say that there might not have been an order for discovery of ship's papers. But, when one finds that the only claim in this case is on a fire insurance, that the exceptional privilege given to underwriters of a marine policy has never been extended to other insurances, and that most experienced judges in the Court of

(1) 8 Q. B. D. 142.
(2) [1891] 1 Q. B. 557.
(3) 10 Com. Cas 224.
(4) [1905] 2 K. B. 83.

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Appeal have refused to allow it in the case of an insurance on an inland transit, though they have allowed it where the insurance was substantially a marine insurance, it appears to me clear that the order of the learned judge cannot stand, and the appeal must be allowed.

FARWELL L.J. I agree, and I only wish to add a very few observations. The jurisdiction of the Court to grant discovery of documents depends now, generally speaking, on Order xxxi., r. 12, which extends only to relevant documents which are or have been in the possession or power of the other party to a cause or matter. But it was held in the case of *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (1) that the effect of the rule is not to exclude or abrogate the old practice as to discovery of ship's papers, which existed long before the Judicature Acts. The only cases, however, to which that practice has been applied are cases of marine insurance. In *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation* (2) A. L. Smith L.J. said: "This question of production of ship's papers is peculiar to marine policies." I do not think that we have any jurisdiction to make a new rule extending the power given by Order xxxi., r. 12, or to order discovery otherwise than as provided for by that rule except so far as we may find a pre-existing practice justifying us in doing so. The cases, in my opinion, clearly shew that such an order as that now in question could only be made in the case of marine policies. In this case the claim is not upon such a policy. It is immaterial that, in another clause of the same document, which is not sued upon, there is an insurance against marine risks.

Appeal allowed.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Telfer Leviansky & Co.*

(1) 8 Q. B. D. 142. (2) [1898] 2 Q. B. 187.

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ADMINISTRATION—*continued.*
June 24 a quarter's rent became due, but was not paid. On August 23 the plaintiff, the lessor, commenced an action against the defendant for recovery of possession of the premises on non-payment of rent, and for rent and mesne profits. Judgment for possession was obtained under Order XIV., and on October 18 the defendant went out of possession. The rent of the premises under the lease was 450*l.* a year. While the defendant was in possession he used reasonable diligence to find a purchaser of the lease or a tenant, but without success, and the only sum received by him in respect of the premises was 26*l.* 5*s.*, being rent from a sub-tenant of a part of the premises:—
Held, that the defendant, having entered into possession, was personally liable to the plaintiff for rent from June 7 to August 23 at the rate of 450*l.* a year, that being the yearly value of the premises, and for mesne profits at the same rate from the latter date to October 18. WHITEHEAD *v.* PALMER - **Channell J. 151**

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An assistant teacher in a public elementary school has authority to inflict corporal punishment on a pupil if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school, and such as the parent of the child might expect that the child would receive if it did wrong; and the fact that by the regulations of the school assistant teachers are forbidden to inflict corporal punishment will not of itself render the assistant teacher liable in an action by the pupil for assault.

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BANKER—*Cheque—Countermand by Telegram—Notice—Action for Money had and received—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 75, *sub-s.* 1.

Though a telegram countermanding a cheque may reasonably be acted upon by a banker, at least to the extent of postponing the honouring of the cheque until further inquiry can be made, yet a banker is not bound to accept an unauthenticated telegram as sufficient authority for the serious step of refusing payment.

On October 31, 1906, the plaintiff drew a cheque for 63*l.* on his bankers, the defendants. On the same day, after business hours, he telegraphed to countermand payment of this cheque. The telegram was delivered on the evening of the same day by the Post Office, and, it being after office hours, was placed in the letter-box of the bank. By an oversight on the part of the defendants' servants this telegram was not brought to the notice of their manager until November 2. On November 1 the cheque was presented and paid.

In an action for money had and received:—

Held, that payment of the cheque was not in fact countermanded within the meaning of s. 75 of the Bills of Exchange Act, 1882, although it might well be that it was owing to the negligence of the bank officials that notice of the customer's desire to stop the cheque was not received in time. CURTICE *v.* LONDON CITY AND MIDLAND BANK, LD. - - **C. A. 293**

2. —— *Cheque—Forged Indorsement—Payee—"Fictitious Person"—Belief or Intention of Drawer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

W., by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged K.'s indorsement to the cheque and paid it in to his account with the defendant bank, who credited him with the amount and collected the money from the C. Bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company:—

Held (affirming the judgment of Bray J., [1906] 2 K. B. 718) that, as K. was an existing person designated by the plaintiff and intended by him to be the payee of the cheque, the payee was not a "fictitious person" within s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for the conversion.

Vinden v. *Hughes*, [1905] 1 K. B. 795, approved. MACBETH *v.* NORTH AND SOUTH WALES BANK - - - - - **C. A. 13**

BANKRUPTCY—*Bankruptcy Notice—Receiving Order—Bill of Exchange—Conditional Payment—Dishonoured Bill—Bill outstanding in Third*

BANKRUPTCY—*continued.*

Party—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

The acceptance by a judgment creditor of a bill, or promissory note, for the amount of his debt operates as an agreement not to enforce that debt during the currency of the bill, and afterwards, notwithstanding dishonour, so long as the bill is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor.

A creditor who had accepted a bill of exchange for the amount of his judgment debt, which was dishonoured but was outstanding in the hands of a third party, issued a bankruptcy notice upon the judgment under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*) :—

Held, that this was not a debt on which a bankruptcy notice could be served, and that the notice and a receiving order made upon it must be set aside.

In re A DEBTOR. *Ex parte* THE DEBTOR
C. A. 344

2. —— *Firm Bankrupt in England and in India—English Trustee and Indian Official Assignee—English Creditors and Indian Creditors—Agreement for pooling and distributing the Assets—Sanction of Court—Jurisdiction.*

Where a firm is bankrupt in England and abroad, and has English and foreign assets and English and foreign creditors, the Court has jurisdiction to sanction an agreement between the trustee in bankruptcy in England and the official assignee abroad for pooling all the assets and distributing them rateably amongst the English and foreign creditors, notwithstanding that the Bankruptcy Act, 1883, contains no express provisions authorizing such a scheme. *In re* P. MACFADYEN & CO. *Ex parte* VIZIANAGARAM COMPANY., LD. - - **Bigham J. 675**

3. —— *Set-off—Gift of Money by Bankrupt to Wife—Gift void as voluntary Settlement—Claim by Trustee in Bankruptcy—Debt due from Bankrupt to Wife—Right of Wife to set off—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 47.

A payment of 250*l.* by a bankrupt to his wife before bankruptcy was declared void against the trustee in bankruptcy as a voluntary settlement. At the date of the bankruptcy a debt of 250*l.* was due from the bankrupt to his wife. In an action by the trustee to recover the sum of 250*l.* from the wife, she claimed to set off the debt of 250*l.* due to her from the bankrupt :—

Held (Fletcher Moulton L.J. dissenting), that the 250*l.* claimed in respect of the voluntary settlement was not a debt due to the bankrupt from his wife, and that there was, therefore, no right of set-off under s. 38 of the Bankruptcy Act, 1883. LISTER *v.* HOOSON - - **C. A. 174**

4. —— *Sham Sale by Debtor—Part Payment of Purchase-money—Right of Proof by Purchaser for Money actually paid.*

The owner of a business, who had procured A. to become surety for the payment of a debt, and for that purpose to join him in making certain promissory notes, upon the eve of his bankruptcy entered into an agreement with A. for the sale to him of his business and stock-in-trade. By the terms of the agreement A., by way of part payment of the purchase-money, took over the sole liability upon the notes. Subsequently the vendor was adjudicated bankrupt, and the trustee in bankruptcy obtained a judgment declaring that the agreement and sale were a sham and void. A., who in the meantime had paid the notes, then put forward a proof against the debtor's estate for the money so paid as in respect of a consideration which had failed :—

Held, upon the authority of *In re Cross*, (1848) 4 De G. & Sm. 364, n., and *Ex parte Phillips*, (1888) 36 W. R. 567, that, although the debtor's estate had had the benefit of the payment, A. could not prove for it, as it had been paid in the course of carrying out a transaction devised in fraud of the general body of creditors ; that so much of the fraudulent agreement as was disadvantageous to A., and precluded him from having recourse to the debtor as the principal maker of the notes, was binding on him, though the part which was advantageous to him did not bind the other creditors. *In re* MYERS. *Ex parte* MYERS - - - - **Div. Ct. 941**

5. —— *Special Manager—Default in accounting — Four-day Order — Jurisdiction — Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 12 ; *s.* 102, *sub-s.* 5 —*Bankruptcy Rules*, 1886, *r.* 344.

The Court has jurisdiction under sub-s. 5 of s. 102 of the Bankruptcy Act, 1883, to make a four-day order for accounts against a special manager of a debtor's business appointed by an official receiver under s. 12 of the Act. *In re* JONES. *Ex parte* OFFICIAL RECEIVER
Phillimore J. 204

—— Administration order made under Bankruptcy Act, 1883 - - - - **1**
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—— Set-off—Mutual dealings - - - **195**
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BANKRUPTCY RULES, 1886, r. 344 - **204**
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BILL OF COSTS—Solicitors'.
See under SOLICITOR.

BILL OF EXCHANGE—*Indorsement by way of Security—Signature in blank—Bill not complete and regular on Face of it—Estoppel—"Holder in due Course"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 20.

The defendant entered into an agreement with the plaintiff to guarantee the payment by T. for goods sold to him by plaintiff, and for that purpose to indorse bills accepted by T. for the amount. In pursuance of that agreement T. wrote his acceptances across the face of two blank stamped bill forms, and the defendant indorsed them. T. then handed the bill forms to the plaintiff, who filled up the body of the bills for the agreed amount, making them payable to his order, signed them as drawer, and also indorsed them. The plaintiff duly delivered the goods to T., who eventually was unable to pay for them :—

Held, that as the defendant agreed to be liable for the price of the goods supplied by the plaintiff

BILL OF EXCHANGE—*continued.*

to T., and indorsed the bills for that purpose, he was liable on these bills.

Decision of A. T. Lawrence J., [1907] 2 K. B. 507, affirmed. GLENIE *v.* BRUCE SMITH.
C. A. 263

—— Bankruptcy notice—Receiving order—Conditional payment—Dishonoured bill—Bill outstanding in third party - **344**
See BANKRUPTCY. 1.

—— Cheque — Countermand by telegram — Notice — Action for money had and received - - - - - - **293**
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—— Cheque — Forged indorsement — Payee — "Fictitious person" - - - **13**
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BILL OF LADING—Charterparty—Signature of bill of lading by time charterer on behalf of shipowner - - - **185**
See SHIPPING. 2.

—— Limitation of shipowner's liability—Loss due to shipowner's negligence - **796**
See SHIPPING. 3.

BILL OF SALE—*Agreement for Ledger Account with a Trader—General Lien for Carriage of Goods—Licence to take Possession—Tenancy—Bankruptcy of Trader—Damages for Trespass and causing Bankruptcy—Cause of Action passing to Trustee—Mutual Dealing—Set-off—Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 38.

A railway company let to a coal merchant certain land at a monthly rental for stacking coal unloaded from trucks on the company's railway sidings. The land adjoined the sidings and was within the company's railway yard, the gates of which were closed during the night. By an agreement between the company and the coal merchant the latter agreed to open in their ledger a monthly credit account with the coal merchant for the carriage of coal upon the condition that they should have a lien upon all waggons, goods, minerals, &c., conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggons, goods, minerals, &c., in order to satisfy the lien; and the company reserved the right to close the account upon giving one day's notice of their intention so to do, whereupon the whole of the account was to become due. The account being in arrear, the company gave notice and closed the account, and took possession of the coal in the trucks on the sidings and also the coal and other goods on the land. The coal merchant was shortly afterwards adjudicated bankrupt. His trustee in bankruptcy brought an action against the company for wrongfully trespassing and seizing the coal and other goods, alleging that the agreement was a bill of sale and void for non-registration, and that the act of the company stopped the business and brought about the bankruptcy:—

Held, that the agreement was not a bill of sale, and therefore that the plaintiff could not recover.

Spencer v. *Midland Ry. Co.*, (1895) 11 Times L. R. 408, 542, followed.

Held, also, that, even if the company's acts were not justified in law, the damages claimed for the trespass and for causing the bankruptcy were in respect of a cause of action personal to the bankrupt which did not pass to his trustee in bankruptcy.

Held, also, that the company could not have set off the debt due to them for carriage of coal against any damages the trustee might have recovered, as it was not a case of mutual dealings within s. 38 of the Bankruptcy Act, 1883. TRUSTEE OF THE PROPERTY OF F. LORD (A BANKRUPT) *v.* GREAT EASTERN RAILWAY COMPANY - - - - - **Phillimore J. 195**

2. —— *Validity—Defeasance—Registration—Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3.

By a bill of sale the mortgagor agreed to pay the principal sum (together with the interest then due) by equal weekly instalments. Owing to the difficulty of calculating the varying amount of interest due from week to week the parties agreed to substitute for the mode of payment provided by the bill of sale payment by equal weekly instalments of an increased amount, to cover principal and interest, but this arrangement did not alter the aggregate amount payable by the mortgagor for principal and interest:—

Held, that this was a defeasance within s. 10, sub-s. 3, of the Bills of Sale Act, 1878, which ought to have been contained in the body of the bill of sale or written on the same paper with it before registration, and that the bill of sale was void.

Reed v. *Franks*, (1900) 16 Times L. R. 347, overruled. PETTIT *v.* LODGE & HARPER
C. A. 744

—— Company—Debenture—Bill of sale—Non-registration—Debenture of foreign company - - - - - - - **667**
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BOARD OF EDUCATION—Decision of—Jurisdiction of Court—Injunction - **685**
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CAPTURE — Insurance, Marine — Warranty of freedom from capture — Capture of neutral ship by belligerents—Subsequent loss by perils of the sea - **601**
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—— *Andersen* v. *Marten* - [1907] 2 K. B. 248
Affirmed by C. A. - **[1908] 1 K. B. 601**

—— *Andrew* v. *Bridgman* - [1907] 2 K. B. 494
Affirmed by C. A. - **[1908] 1 K. B. 596**

—— *Attorney-General* v. *Bouwens*, (1838) 4 M. & W. 171.
Followed and applied by C. A. WINANS *v.* REX - **[1908] 1 K. B. 1022**

—— *Attorney-General* v. *Glendining*, (1904) 92 L. T. 87.
Affirmed by C. A. WINANS *v.* REX **[1908] 1 K. B. 1022**

—— *Becquet* v. *MacCarthy*, (1831) 2 B. & Ad. 951.
Commented on by C. A. EMANUEL *v.* SYMON - - **[1908] 1 K. B. 302**

—— *Bischoff's Trustee* v. *Frank*, [1903] 89 L. T. 189.
Followed by C. A. CHAPLIN & Co. *v.* BRAMMALL - **[1908] 1 K. B. 233**

—— *Bromley Rural Council* v. *Croydon Corporation*, [1907] 2 K. B. 39.
Reversed by C. A. - **[1908] 1 K. B. 353**

—— *Cairn Line of Steamships, Ld.* v. *Trinity House Corporation*, [1907] 1 K. B. 604.
Affirmed by C. A. - **[1908] 1 K. B. 528**

—— *Cale* v. *James* - [1897] 1 Q. B. 418
Followed by Pickford J. COBBETT *v.* WOOD - - **[1908] 1 K. B. 590**

—— *Charrington & Co., Ld.* v. *Camp*, [1902] 1 Ch. 386.
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—— *Cross, In re* (1848) 4 De G. & Sm. 364, n.
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—— *De La Bere* v. *Pearson, Ld.*, [1907] 1 K. B. 483.
Affirmed by C. A. - **[1908] 1 K. B. 280**

—— *Dewar* v. *Goodman* - [1907] 1 K. B. 612
Affirmed by C. A. - **[1908] 1 K. B. 94**

—— *Doughty* v. *Bowman* - (1848) 11 Q. B. 444
Discussed by Div. Ct. DEWAR *v.* GOODMAN - **[1908] 1 K. B. 94**

—— *Emanuel* v. *Symon* - [1907] 1 K. B. 235
Reversed by C. A. - **[1908] 1 K. B. 302**

—— *Gingell, Son & Foskett, Ld.* v. *Stepney Borough Council*, [1906] 2 K. B. 468.
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—— *Glenie* v. *Bruce Smith*, [1907] 2 K. B. 507
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—— *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713
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—— *Groh* v. *Hesketh* - [1907] 2 K. B. 232
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—— *Hellawell* v. *Eastwood* - (1851) 6 Ex. 295
Not followed by Div. Ct. CROSSLEY BROTHERS, LD. *v.* LEE. **[1908] 1 K. B. 86**

—— *Hobson* v. *Gorringe* - [1897] 1 Ch. 182
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—— *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1907] 1 K. B. 14.
Affirmed by C. A. - **[1908] 1 K. B. 327**

—— *Howe* v. *Newington Licensing Justices*, [1907] 2 K. B. 340.
Affirmed by C. A. - **[1908] 1 K. B. 260**

—— *Johnson* v. *Pickering; Norton, Claimant*, [1907] 2 K. B. 437.
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—— *Kelsey* v. *Dodd* - (1881) 52 L. J. (Ch.) 37
Discussed and distinguished by C. A. FORSTER *v.* ELVET COLLIERY CO. **[1908] 1 K. B. 629**

—— *Kettlewell* v. *Refuge Assurance Co.*, [1907] 2 K. B. 242.
Affirmed by C. A. - **[1908] 1 K. B. 545**

—— *Leonis Steamship Co.* v. *Rank, Ld.*, [1907] 1 K. B. 344.
Reversed by C. A. - **[1908] 1 K. B. 499**

—— *Macbeth* v. *North and South Wales Bank*, [1906] 2 K. B. 718.
Affirmed by C. A. - **[1908] 1 K. B. 13**

—— *Mansell* v. *Griffin*, - [1908] 1 K. B. 160
Affirmed by C. A. - **[1908] 1 K. B. 947**

—— *Nelson* v. *Dahl* - (1879) 12 Ch. D. 568
Explained and followed by C. A LEONIS STEAMSHIP CO. *v.* RANK, LD. **[1908] 1 K. B. 499**

—— *Norman, In re* - (1886) 16 Q. B. D. 673
Followed by C. A. *In re* HIRST & CAPES - - - **[1908] 1 K. B. 982**

—— *North Manchester Overseers* v. *Winstanley*, [1907] 1 K. B. 27.
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—— *Oliver* v. *Camberwell Borough Council*, (1904) 68 J. P. 165.
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—— *Oppenheimer* v. *Attenborough & Son*, [1907] 1 K. B. 510.
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—— *Ossalinsky (Countess) and Manchester Corporation, In re* (1883). Not reported. Referred to by Bray J. *In re* LUCAS AND CHESTERFIELD GAS AND WATER BOARD - [1908] **1 K. B. 571, 577, 579**

—— *Philips, Ex parte* - (1888) 36 W. R. 567 Followed by Div. Ct. *In re* MYERS [1908] **1 K. B. 941**

—— *Pyman* v. *Dreyfus* - (1889) 24 Q. B. D. 152 Explained and followed by C. A. LEONIS STEAMSHIP CO. *v.* RANK, LD. [1908] **1 K. B. 499**

—— *Reed* v. *Franks*, (1900) 16 Times L. R. 347. Overruled by C. A. PETTIT *v.* LODGE & HARPER - - [1908] **1 K. B. 744**

—— *Reg.* v. *Cox* - - (1844) 1 C. & K. 494 Questioned by C. C. R. REX *v.* STRIDE & MILLARD - - [1908] **1 K. B. 617**

—— *Reg.* v. *Haslehurst* - (1887) 51 J. P. 645 Followed and approved by C. A. REX *v.* CARSON ROBERTS [1908] **1 K. B. 407**

—— *Rex* v. *Carson Roberts*, [1907] 2 K. B. 878. Affirmed by C. A. [1908] **1 K. B. 407**

—— *Rex* v. *Rough* - (1779) 2 East, P. C. 607 Distinguished by C. C. R. REX *v.* STRIDE & MILLARD [1908] **1 K. B. 617**

—— *Reynolds* v. *Ashby* - [1903] 1 K. B. 87 Followed by Div. Ct. CROSSLEY BROTHERS, LD. *v.* LEE [1908] **1 K. B. 86**

—— *Rhodes, In re* - - (1844) 8 Beav. 224 Observations of Lord Langdale M.R. in, not followed by C. A. *In re* HIRST & CAPES - - - [1908] **1 K. B. 982**

—— *Rhondda Urban Council* v. *Taff Vale Ry. Co.*, [1907] 1 K. B. 739. Appeal dismissed and cross-appeal allowed by C. A. - [1908] **1 K. B. 239**

—— *Richmond Hill Steamship Co.* v. *Trinity House Corporation*, [1896] 2 Q. B. 134. Not followed by C. A. CAIRN LINE OF STEAMSHIPS, LD. *v.* TRINITY HOUSE CORPORATION - [1908] **1 K. B. 528**

—— *Ricket* v. *Metropolitan Ry. Co. (Directors, &c., of the)*, (1867) L. R. 2 H. L. 175. Considered by Walton J. ANGLO-ALGERIAN STEAMSHIP CO. *v.* HOULDER LINE, LD. - - [1908] **1 K. B. 659**

—— *Sampson* v. *Easterby*, (1829) 9 B. & C. 505, (1830) 6 Bing. 644. Distinguished by C. A. DEWAR *v.* GOODMAN - - [1908] **1 K. B. 94**

—— *Samuel Brothers Ld.* v. *Whetherly*, [1907] 1 K. B. 709. Affirmed by C. A. - [1908] **1 K. B. 184**

—— *Sirdar Gurdyal Singh* v. *Faridkote (Rajah of)*, [1894] A. C. 670. Followed by C. A. EMANUEL *v.* SYMON - - - [1908] **1 K. B. 302**

—— *Smith* v. *Humble* - (1854) 15 C. B. 321 Followed by C. A. MANSFIELD *v.* RELF - - - [1908] **1 K. B. 71**

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—— *Smith's Dock Co.* v. *Tynemouth Corporation*, [1908] 1 K. B. 315. Affirmed by C. A. - [1908] **1 K. B. 948**

—— *Spencer* v. *Midland Ry. Co.*, (1895) 11 Times L. R. 408, 542. Followed by Phillimore J. LORD *v.* GREAT EASTERN RY. CO. [1908] **1 K. B. 195**

—— *Thompson, In re* - - (1845) 8 Beav. 237 Observations of Lord Langdale M.R. in, not followed by C. A. *In re* HIRST & CAPES [1908] **1 K. B. 982**

—— *Turnbull & Co.* v. *Duval*, [1902] A. C. 429. Followed by C. A. CHAPLIN & CO. *v.* BRAMMALL - - [1908] **1 K. B. 233**

—— *United States Shipping Co.* v. *Empress Assurance Corporation*, [1907] 1 K. B. 259. Affirmed by C. A. [1908] **1 K. B. 115**

—— *Vinden* v. *Hughes* - [1905] 1 K. B. 795 Approved by C. A. MACBETH *v.* NORTH AND SOUTH WALES BANK [1908] **1 K. B. 13**

—— *Waddle* v. *Sunderland Union*, [1906] 2 K. B. 899. Affirmed by C. A. [1908] **1 K. B. 642**

—— *Watson* v. *Home* - - (1827) 7 B. & C. 285 Followed by C. A. MANSFIELD *v.* RELF - - - [1908] **1 K. B. 71**

—— *Western* v. *Kensington Assessment Committee*, [1907] 2 K. B. 323. Affirmed by C. A. [1908] **1 K. B. 811**

—— *Yuill & Co.* v. *Scott Robson*, [1907] 1 K. B. 685. Affirmed by C. A. - [1908] **1 K. B. 270**

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Debentures of a limited liability company registered in Guernsey creating a charge on floating real and personal property of the company are exempted from the operation of the Bills of Sale Acts, 1878 and 1882, by s. 17 of the latter Act. CLARK *v.* BALM, HILL & Co.
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—— Libel—Absolute privilege—Report of official receiver under Companies (Winding-up) Act, 1890 - - - - - - 584
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COMPENSATION—*Damage caused by exercise of Statutory Powers—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 308—*Sewers.*

The respondents, acting under the powers conferred by the Public Health Act, 1875, constructed an intercepting sewer, a pumping station, a sewage reservoir, and an outfall sewer, which were integral parts of, and together formed, one scheme of sewerage. The sewers were in part constructed on land the property of the claimant; the pumping station and the reservoir were constructed on land the property of other persons. The present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes:—

Held, that as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers" of the Public Health Act within the meaning of s. 308 of that Act, and consequently that the claimant was not entitled to any compensation under that Act in respect of that depreciation.

Judgment of Bigham J., [1907] 1 K. B. 14, affirmed. HORTON *v.* COLWYN BAY AND COLWYN URBAN DISTRICT COUNCIL - C. A. 327

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—— Licensing Acts.
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—— Mine—Covenant—Compensation for subsidence—Heirs and assigns of covenantee—Covenantee not a party 629
See MINES. 2.

COMPENSATION—*continued.*

—— Railway company—Limestone required to be left unworked - - - 925
See MINES. 1.

—— Waterworks—Reservoir—Land compulsorily taken—Special value—Obtainable by compulsory powers - - 571
See WATERWORKS. 1.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITIONAL LICENCE—Hours of opening—Application for occasional licence 654
See LICENSING ACTS. 1.

CONSIDERATION—Breach of duty to take care—Damages—Remoteness - - 280
See CONTRACT.

CONTRABAND OF WAR—Warranty against—Contraband persons—Breach of warranty - - - - - - 910
See INSURANCE, MARINE. 2.

CONTRACT—*Consideration—Breach of Duty to take Care—Damages—Remoteness—Intervening Criminal Act of Third Party causing Loss.*

The defendants, who were newspaper proprietors, advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff, a reader of the paper, wrote to the defendants' city editor asking for a safe investment for 800*l.*, and also for the name of a "good stockbroker." The editor recommended a person who, as he well knew, was an "outside broker," that is, a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. The outside broker had for some months been employed by the editor to advise him on matters connected with the financial correspondence in the defendants' newspaper, and there was no evidence that the editor had any reason to suspect his honesty. The outside broker was, in fact, an undischarged bankrupt, a fact which was unknown to the editor, who might, however, easily have ascertained his financial position if he had made inquiries. The plaintiff, in reliance on the editor's recommendation, sent sums of 1300*l.* and 100*l.* for investment to the outside broker, who immediately misappropriated them:—

Held, that there was a contract between the plaintiff and the defendants by which the defendants undertook to use reasonable care that the person recommended as a broker should answer the description of a good stockbroker; that the defendants' city editor, in recommending the outside broker without making reasonable inquiries about him, had committed a breach of that contract; and that the plaintiff's loss naturally flowed from the defendants' breach of contract, even if the misappropriation of the money by the broker amounted to a criminal offence.

Held, also, by Vaughan Williams L.J. and Sir Gorell Barnes, President (Bigham J. doubting), that the measure of damages was not limited to the 800*l.*, but that the plaintiff was entitled to recover the actual amount of his loss.

Decision of Lord Alverstone C.J., reported

CONTRACT—*continued.*

[1907] 1 K. B. 483, affirmed. DE LA BERE *v.* PEARSON, LD. - - - - - **C. A. 280**

—— Breach of promise of marriage—Married man—Public policy - - **720, 729**
See MARRIAGE. 1, 2.

—— Electricity, Supply of — Loughborough Corporation — Breach of contract — Remedy for - - - - - **205**
See STATUTE.

—— Indemnity.
See under INDEMNITY.

—— Volunteer corps — Commanding officer — Liability on contract—Goods supplied for use of corps - - - - **184**
See ARMY AND NAVY.

CONVEYANCING AND LAW OF PROPERTY—Lease—Covenant not to assign without consent—Payment for leave to assign
See LANDLORD AND TENANT. 1. **596**

—— Lease—Deed of covenant—Owners for time being—Covenant running with the land —Mine—Compensation for subsidence
See MINES. 2. **629**

COPYRIGHT—"*Dramatic Piece*"—*Accessories of Piece as performed—Scenic Effects—Stage Business—Matter incapable of being printed and published—Infringement—Dramatic Copyright Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 15), *s.* 1—*Copyright Act*, 1842 (5 *&* 6 *Vict. c.* 45).

The Acts relating to dramatic copyright contemplate, as the subject of protection under them, something which can be printed and published. Therefore, where a dramatic piece in which there is copyright is, as regards the verbal composition, in substance entirely different from another dramatic piece alleged to constitute an infringement of that copyright, the mere fact that accessorial matters, such as scenic effects, make-up of actors, or stage "business," in the latter piece, as performed, are similar to those employed in the performance of the former will not constitute an infringement of the copyright therein, such matters, taken by themselves, not being the subject of protection under the Acts relating to dramatic copyright, though in cases where the verbal composition of the pieces is more or less similar, such matters may be regarded as throwing light on the question whether there has been an infringement.

Discussion as to what constitutes authorship of a piece. TATE *v.* FULLBROOK - **C. A. 821**

CORPORATION—*Dissolution—Bona vacantia—Chattels Real—Landlord and Tenant—Lease—Limited Company Lessees—Sureties for Payment of Rent during the Term—Dissolution of Company — Reverter to Lessor — Acceleration of Reversion—Determination of Term—Liability of Sureties.*

A lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the lease. On dissolution of the corporation the lease does not vest in the Crown as bona vacantia, but the reversion is accelerated and the land reverts to the lessor.

Therefore, where a lease was made to a limited company and payment of the rent during the term was guaranteed by sureties, on dissolution of the company under ss. 142 and 143 of the Companies Act, 1862 :—

Held, that the lease, not having been assigned, had determined, and with it the liability of the sureties. HASTINGS CORPORATION *v.* LETTON - - - - - **Div. Ct. 378**

CORPS—Volunteer corps.
See under ARMY AND NAVY.

COSTS—Appeal—"Criminal cause or matter"—Distress—Bailiff—Costs and charges
See PRACTICE. 2. **672**

—— County court—Scale—Claim for injunction —Judgment on alternative claim for sum not exceeding 10*l.* - - **109**
See COUNTY COURT. 1.

—— Nonsuit—Limits of judge's discretion as to costs - - - - - - **24**
See COUNTY COURT. 3.

—— Sewers.
See under SEWERS.

—— Solicitors' costs.
See under SOLICITOR.

COUNCILLOR — Disqualification — Paid office under the council—Distress committee
See LOCAL GOVERNMENT. 2. - **858**

COUNTY COURT—*Costs—Scale—Claim for Injunction—Alternative and Independent Claim —No Injunction Granted—Judgment on Alternative Claim for Sum not exceeding* 10*l.*—*Practice — County Court Rules*, 1903, *Order LIII., rr.* 1, 11.

Order LIII., r. 11, of the County Court Rules, 1903, provides that in actions in which a perpetual injunction is claimed, whether the same is granted or not, the judge may order the costs to be taxed under column A, B, or C, and in default of any such order they shall be taxed under column B.

In an action in the county court in which a perpetual injunction was claimed there was added another claim which was alternative to and inconsistent with the claim for an injunction. The plaintiff failed as to the injunction, but got judgment on the other branch of the claim for 4*l.* 4*s.* and costs. No application was made to the judge for an order directing under which scale the costs should be taxed, and on an application to review the taxation the judge held that under Order LIII., r. 11, in default of any order, the costs should be taxed under column B :—

Held that, the claim on which the plaintiff had recovered judgment being entirely distinct from the claim for an injunction, the case was governed, not by r. 11, but by r. 1, of Order LIII., and that under r. 1 the costs must be taxed under the lower scale, that being the scale applicable to the amount recovered. CLINTON *v.* BENNETT - - - - **Div. Ct. 109**

2. —— *Jurisdiction — Staying Proceedings where Submission to Arbitration — Practice — Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 4, 27.

A county court judge has jurisdiction, under s. 4 of the Arbitration Act, 1889, to stay any

COUNTY COURT—*continued.*

legal proceedings in his court by any party to a submission against another party in respect of any matter agreed to be referred. MORRISTON TINPLATE COMPANY *v.* BROOKER, DORE & CO. **Div. Ct. 403**

3. —— *Practice—Nonsuit—Costs—Limits of Judge's Discretion as to—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 88, 93, 113.

In an action in the county court where the judge is satisfied upon the plaintiff's case that the defendant is not liable, he has no power to enter a nonsuit, but ought to give judgment for the defendant.

Semble, that if in an action in the county court the judge finds that the plaintiff has sued the wrong party, it is not a ground for depriving the successful defendant of his costs that, having the necessary information to enable the plaintiff to ascertain who was the proper party to be sued, he neglected to give it to the plaintiff. WESTGATE *v.* CROWE - - **Div. Ct. 24**

4. —— *Remittal of Action to County Court—Action of Tort—Practice—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 66.

The plaintiff in an action in the High Court alleged in the statement of claim that she employed the defendant, a dentist, for reward to extract a tooth by his painless process, but that the tooth was so unskilfully extracted that portions of it were left in the plaintiff's jaw, whereby illness, pain, and suffering were caused to her:—

Held, that the action was an action of tort within the meaning of s. 66 of the County Courts Act, 1888, and might be remitted to the county court under that section on the ground that the plaintiff had no visible means of paying the defendant's costs should a verdict not be found for the plaintiff. EDWARDS *v.* MALLAN **C. A. 1002**

—— Highway — Extraordinary traffic — Summary proceedings — Jurisdiction of county court - - - - - **958**
See HIGHWAY. 2.

—— Licensing Acts — Compensation — Determination by county court—Appeal - **28**
See LICENSING ACTS. 2.

—— New trial—Assault — Schoolmaster — Corporal punishment - - - **947**
See ASSAULT.

COUNTY COURT RULES, 1903, Order LIII., rr. 1, 11 - - - - - **190**
See COUNTY COURT. 1.

COVENANT—Lease — Covenant not to assign without consent—Payment for leave to assign - - - - - - - **596**
See LANDLORD AND TENANT. 1.

—— Lease—Covenant running with the land—Covenant by lessor to perform covenants of head lease—Collateral covenant- **94**
See LANDLORD AND TENANT. 2.

—— Lease—Land tax, Covenant by Lessor to pay — Construction — Value of land improved by building - - - **71**
See LANDLORD AND TENANT. 3.

COVENANT—*continued.*

—— Lease—Mine—Compensation for subsidence—Covenant running with the land
See MINES. 2. **629**

CRIMINAL ACT — Intervening, of third party causing loss—Damages—Remoteness
See CONTRACT. **280**

CRIMINAL LAW — *Pleading — Indictment—Sufficiency of Averments.*

In an indictment for receiving stolen goods it is enough to allege that the prisoner received them knowing them to have been feloniously stolen, without further alleging that the stealing of them amounted to a felony at common law or under the Larceny Act, 1861.

An indictment charged that the defendant "one thousand pheasants' eggs of the goods and chattels of and belonging to W. G. feloniously did steal &c." It was contended for the defence that the indictment was bad in that it did not allege that the eggs had been reduced into possession, and that without such an averment the eggs, being those of a bird feræ naturæ, were prima facie not the subject of larceny:—

Held, that the words "of and belonging to," being in addition to the ordinary formal words "of the goods and chattels of," coupled with the fact that the large quantity of the eggs stolen suggested that they had previously to the stealing been taken from the nests and collected into one place, amounted to a sufficient averment that the eggs had at the time of the stealing been reduced into the possession of the person in whom the property was laid.

Rex v. *Rough*, (1779) 2 East, P. C. 607, distinguished.

Reg. v. *Cox*, (1844) 1 C. & K. 494, questioned. THE KING *v.* STRIDE AND MILLARD **C. C. R. 617**

—— Appeal—"Criminal cause or matter"—Distress—Bailiff—Costs and charges **627**
See PRACTICE. 2.

CUSTOM—Authority to pledge, Extent of—"Mercantile agent"—Custom of particular trade - - - - - **221**
See FACTOR.

CUSTOM OF PORT — Ship — Charterparty — Demurrage—Surf days—Delay caused by surf - - - - - **490**
See SHIPPING. 5.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE AND DAMAGES — Compensation — Damage caused by exercise of statutory powers—Public health - - **327**
See COMPENSATION.

—— Negligent navigation—Damage to dock.
See NEGLIGENCE. **659**

—— Remoteness — Contract — Consideration — Breach of duty to take care - - **280**
See CONTRACT.

DEATH—Execution by fieri facias—Death of judgment debtor before seizure by sheriff—Administration order - - - **1**
See SHERIFF.

DEATH—*continued.*

—— Lessee, Death of—Administrator ad colligenda bona—Power to sell—Entry into possession—Rent - - - **151**
See ADMINISTRATION.

DEBENTURES—Bill of sale—Non-registration—Debenture of foreign company - **667**
See COMPANY.

—— Stamp duty—Trust deed for securing debenture stock—"Mortgage" - **865**
See REVENUE. 5.

DEBT—Gambling debt.
See under GAMBLING DEBT.

DEDICATION — Manorial market — Extent of franchise—New streets—Presumption
See MARKET. **115**

DEFAMATION—*Libel—Absolute Privilege—Report of Official Receiver under Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-s.* 2.

The absolute privilege attaching to the statements of judicial officers, advocates, and witnesses is not a privilege to be malicious, but a privilege that their statements in judicial proceedings should be exempt from any inquiry whether they were prompted by malice or not, it being for the public interest that such statements should be made without any apprehension of subsequent legal proceedings.

The report of an official receiver made to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, is absolutely privileged. BOTTOMLEY *v.* BROUGHAM - **Channell J. 584**

DEFEASANCE—Bill of sale—Validity—Registration - - - - - - **744**
See BILL OF SALE. 2.

DEMURRAGE—Ship—Charterparty—Lay days—Arrival at place of loading - **499**
See SHIPPING. 4.

—— Ship — Charterparty — Weather working days—Surf days - - - - **490**
See SHIPPING. 5.

DISCOVERY—Ship's papers—Fire insurance
See PRACTICE. 5. **1032**

DISMISSAL — Assistant master — Endowed schools—Scheme—Wrongful dismissal.
See SCHOOLS. 1. **63**

DISQUALIFICATION — Councillor—Paid office under the council—Distress committee
See LOCAL GOVERNMENT. **858**

DISSOLUTION—Corporation.
See under CORPORATION.

DISTRESS—*Landlord and Tenant—Trade Fixture—Hiring Agreement—Gas Engine.*

A gas engine was let out by the plaintiffs on hire under an agreement in writing which provided for monthly payments, and that the engine should remain the property of the plaintiffs until the hirer had exercised the option of purchase given by the agreement, and should be removable by the plaintiffs on the failure of the hirer to pay any instalment. The engine was affixed to the floor of premises, of which the hirer was the defendant's tenant, by bolts and screws, and was used by the hirer for the purposes of his trade. The engine was seized by the defendant under a distress for rent due from the hirer and sold.

Held, that the engine had become a fixture, and was therefore not distrainable.

Hobson v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1903] 1 K. B. 87, followed.

Hellawell v. *Eastwood*, (1851) 6 Ex. 295, not followed. CROSSLEY BROTHERS, LD. *v.* LEE **Div. Ct. 86**

—— Appeal — "Criminal cause or matter" — Bailiff—Costs and charges - - **672**
See PRACTICE. 2.

DISTRESS COMMITTEE—Councillor—Disqualification—Paid office under the council.
See LOCAL GOVERNMENT. 2. **858**

DIVERSION—Highway—Sufficiency of plan.
See HIGHWAY. 1. **374**

DOCKS—Negligence—Damage to dock—Right of public to enter dock—Closing of dock for repairs - - - - **659**
See NEGLIGENCE.

—— West India Dock Act—Ship—Dock company—Exemption from dock rates—Lighter - - - - - - **786**
See SHIPPING. 6.

DOGS—Carrier—Carriage of dogs—Declaration of value - - - - - **252**
See RAILWAY. 2.

DRAINAGE—Neglect to clean and scour channel—Injury to other land—Water mill.
See LAND DRAINAGE. **485**

DRAINS.
See under SEWERS.

DRAMATIC COPYRIGHT.
See under COPYRIGHT.

DRUNKENNESS—Permitting—Lodger at hotel—Arriving drunk - - - **905**
See LICENSING ACTS. 3.

DUTY—Public revenue.
See under REVENUE.

"EARNINGS" — Workmen's compensation — "Tips" - - - - - - **766**
See EMPLOYER AND WORKMAN. 3.

EASEMENT—Light.
See under LIGHT.

ECCLESIASTICAL LAW—Rates—Burial ground separated from church—Churchyard—Liability to poor rate - - **835**
See RATES. 1.

EDUCATION.
See under SCHOOLS.

ELECTRICITY—Supply of—Loughborough Corporation - - - - - - **205**
See STATUTE.

EMPLOYER AND WORKMAN—*Compensation—Basis of Calculation—"Average Weekly Earnings"—"Grade"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

In estimating the average weekly earnings under s. 2 (*a*) of Sched. I. of the Workmen's

EMPLOYER AND WORKMAN—*continued.*

Compensation Act, 1906, the object should be to arrive at the *normal* rate of remuneration of the injured man at the date of the accident; and where exact computation is impracticable, the Court for its guidance *may* have regard to the average weekly amount earned during the previous twelve months by a person in the same grade employed by the same employer, or, failing that, in the same class of employment in the same district.

"Grade" refers to the particular rank in the industrial hierarchy occupied by the workman, and not to his greater or less excellence in that rank; it is a question of fact whether there is a grade to which the workman belongs.

The Court having found that the workman has a grade, is not bound to adopt the average wages in that grade as the basis of compensation, but may take into consideration the personal capacity of the workman.

In an ordinary case the average weekly earnings are to be calculated by dividing the total earnings of the workman during the relevant period, not by the number of weeks in that period, but by the number of weeks actually worked within that period; days in which no work is done and no wages are earned are to be disregarded. But this principle does not apply to cases under s. 1 (*a*) (i.) of the First Schedule.

Per Fletcher Moulton L.J.: The principle does not apply to cases where the limitation upon the time worked arises from the nature of the employment itself, e.g., the case of a charwoman, where a certain amount of discontinuity is an incident of the employment.

In determining whether there has been any change of employment, "employment by the same employer," for the purpose of the First Schedule, means employment in the same grade, and any step up or down from one grade to another is to be regarded as constituting a fresh employment; but in calculating any of the periods mentioned in s. 1 of the schedule absence due to illness or to causes beyond the control of the workman is to be disregarded, and the employment is to be reckoned as continuous.

A collier, who had partially recovered from an accident for which he was receiving compensation, was offered and accepted light employment under a registered agreement with his employers upon the terms of his submitting to a reduction in the rate of compensation. Six months later he met with a fatal accident in the course of such employment. Upon an application by the widow for compensation under the Workmen's Compensation Act, 1906:—

Held, that compensation ought to be calculated solely on the basis of the earnings of the deceased from the light employment without taking into account the compensation he received under the agreement. PERRY *v.* WRIGHT. CAIN *v.* FREDERICK LEYLAND & CO. (1900), LD. BAILEY *v.* G. H. KENWORTHY, LD. GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LD. - - - - - - - - - **C. A. 441**

2. —— *Compensation — Course of Employment — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A large number of colliers, who resided at

EMPLOYER AND WORKMAN—*continued.*

D., six miles away from the colliery where they were employed, were conveyed every morning by a train composed of carriages belonging to the employers, but driven by the railway company, to a platform a quarter of a mile away from the colliery. The platform was erected by the employers on land belonging to the railway company for the exclusive use of the colliers, and was under the control of the employers. The colliers walked from the platform along the high road to the colliery. In the evening a similar train conveyed the colliers from the platform to D. The colliers were conveyed free of charge, and it was an implied term of the contract of service that colliers residing at D. should have the right to travel to and fro without charge. One of the colliers was knocked down and killed while waiting on the platform for the return train. Upon an application by the widow for compensation under the Workmen's Compensation Act, 1906:—

Held (affirming the county court judge), that the accident arose in the course of the employment, which began when the colliers entered the train in the morning and ceased when they left the train in the evening. CREMINS *v.* GUEST, KEEN & NETTLEFOLDS, LD. - - **C. A. 469**

3. —— *Compensation—Rate of Remuneration —"Earnings"—"Tips" or Gratuities—Earnings in the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *s.* 1, (*a*) (*i.*); *s.* 2.

"Earnings in the employment of the same employer" in respect of which compensation is recoverable under the Workmen's Compensation Act, 1906, need not always come from the employer; and where the employment is of such a nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, the money thus received with his knowledge and approval must be brought into account in estimating the "average weekly earnings" in respect of which compensation has to be awarded. PENN *v.* SPIERS & POND, LD. - - - **C. A. 766**

4. —— *Compensation—"Workman"—Ship's Captain — Remuneration — Board and Allowances in Addition to Cash Wages—Computation —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

Sect. 13 of the Workmen's Compensation Act, 1906, provides that "workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year. Upon a claim for compensation by the widow and children of a ship's captain, who was accidentally killed by a tramcar at a port where his ship was in dock, it appeared that the remuneration of the deceased was 216*l.* a year in cash in addition to his board:—

Held that, in considering whether the remuneration exceeded the limit prescribed by the section, the test of the money value of the board provided by the owners was not what the captain saved by the arrangement, or, in other words, what he could have boarded himself for, but what the reasonable style of board provided

EMPLOYER AND WORKMAN—*continued.*
by the owners would have cost him if he had had to purchase it himself. DOTHIE *v.* ROBERT MACANDREW & Co. - - - - - **C. A. 803**

—— Measure, False or unjust—Possession by servant for own fraudulent purpose
See WEIGHTS AND MEASURES. **536**

—— Unemployed Workmen Act, 1905—Councillor—Disqualification—Paid office under the council - - - - - - **858**
See LOCAL GOVERNMENT. 2.

ENDOWED SCHOOLS.
See under SCHOOLS.

ESTATE DUTY—Foreign bonds payable to bearer—Bonds situate in United Kingdom—Marketable securities - **1022**
See REVENUE. 1.

ESTOPPEL—Bill of exchange—Indorsement by way of security—Signature in blank.
See BILL OF EXCHANGE. **263**

EVIDENCE—Railway—Rateable value—Profits—Evidence—Admissibility - - **750**
See RATES. 3.

—— Railway—Regulation—Increase of rates—Reasonableness—Evidence - - **771**
See RAILWAY. 3.

—— Shipping—Surf days—Custom of port—Admissibility of evidence — Time allowed for discharge of cargo—Delay caused by surf - - - - - **490**
See SHIPPING. 5.

EXECUTION—By fieri facias—Death of judgment debtor before seizure by sheriff—Administration order - - - **1**
See SHERIFF.

FACTOR—"*Mercantile Agent*"—*Authority to pledge, Extent of—Custom of Particular Trade—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

The authority given by s. 2 of the Factors Act, 1889, to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them.

Decision of Channell J., [1907] 1 K. B. 510, affirmed. OPPENHEIMER *v.* ATTENBOROUGH & SON - - - - - - - - **C. A. 221**

FINANCE ACTS.
See under REVENUE.

FINE—Lease—Covenant not to assign with consent—Payment for leave to assign **596**
See LANDLORD AND TENANT. 1.

FIRE INSURANCE.
See under INSURANCE, FIRE.

FIXTURES—Distress—Landlord and tenant—Trade fixtures—Hiring agreement—Gas engine - - - - - - **86**
See DISTRESS

FIXTURES—*continued.*
—— Trade fixtures—Hire and purchase agreement — Right of mortgagee against owner of fixtures—Mortgagor in possession - - - - - - - **388**
See MORTGAGE.

FLATS—Valuation (Metropolis) Act—Rateable value—Deductions from gross value
See LONDON. 2. **811**

FOREIGN BONDS—Payable to bearer—Estate duty—Bonds situate in United Kingdom
See REVENUE. 1. **1022**

FOREIGN COMPANY—Debenture of — Bill of sale—Non-registration - - **667**
See COMPANY.

FOREIGN JUDGMENT—*Jurisdiction of Foreign Court—Ownership of Property Abroad—Contract of Partnership Abroad—Partner resident in England—Agreement to submit to Foreign Jurisdiction.*

Neither the fact of possessing property situate in a foreign country nor the fact of entering into a contract of partnership in that country to deal with that property is sufficient to give the Courts of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign Court.

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into a partnership for the working of a gold mine situate in the Colony and owned by the partnership. The defendant ceased to carry on business in Western Australia, and in 1899 he left the Colony permanently and came to live in England. In 1901 the plaintiffs, being partners other than the defendant, brought an action in the Supreme Court of Western Australia claiming a decree for dissolution of the partnership, sale of the mine, and the taking of the partnership accounts. The writ was served on the defendant in England, but he entered no appearance, and took no step to defend the action. The Court decreed a dissolution of the partnership and the sale of the mine, and on taking the accounts found a sum to be due from the partnership. The plaintiffs paid the sum, and brought an action in England to recover the share which they alleged to be due from the defendant:—

Held, that the defendant, not being domiciled in Western Australia, nor resident there at the date of the action in the Supreme Court of that Colony, and not having appeared to the process or expressly agreed to submit to the jurisdiction of that Court, was not bound by its finding or decree; and that the action in this country, which was based on that finding and decree, could not be maintained.

Becquet v. *MacCarthy*, (1831) 2 B. & Ad. 951, commented on.

Sirdar Gurdyal Singh v. *Rajah of Faridkote*, [1894] A. C. 670, followed.

Judgment of Channell J., [1907] 1 K. B. 235, reversed. EMANUEL *v.* SYMON - **C. A. 302**

FORGED INDORSEMENT — Cheque — Payee—"Fictitious person" - - - **13**
See BANKER. 2.

FRANCHISE — Manorial market — Extent of franchise—New streets—Dedication—Presumption - - - - **115**
See MARKET.

FRAUD—Insurance agent—Avoidance of policy—Recovery back of premiums - **545**
See INSURANCE, LIFE.

—— Master and servant — False or unjust measure — Possession by servant for own fraudulent purpose - - **536**
See WEIGHTS AND MEASURES.

FRIVOLOUS AND VEXATIOUS ACTION—Dismissal — Cause of action — Gambling debt—Forbearance to sue—New consideration - - - - - **761**
See PRACTICE. 6.

GAMBLING DEBT — Frivolous and vexatious action—Dismissal—Cause of action—Forbearance to sue—New consideration **761**
See PRACTICE. 6.

GAS ENGINE—Distress—Landlord and tenant—Trade fixtures—Hiring agreement **86**
See DISTRESS.

GENERAL AVERAGE — Shipping — Cargo of coal - - - - - - **51**
See SHIPPING. 1.

GOODS—Sale of.
See under SALE OF GOODS.

GUARANTEE—Signed by wife for debt of husband—Creditor procuring guarantee through husband - - - - **233**
See HUSBAND AND WIFE.

HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847 — Negligent navigation — Damage to dock - - - - **659**
See NEGLIGENCE.

HIGHWAY—*Diversion—Sufficiency of Plan—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 85.

On proceedings being taken under s. 85 of the Highway Act, 1835, for the diversion of a highway, the justices certified that the proposed new highway would be more commodious to the public. The plan which it was proposed to enrol together with that certificate consisted of a sheet of the twenty-five inch Ordnance Survey map, upon which the lines of the old and new highways were marked in colours and the width of the new highway was stated in writing, but the lengths of the old and new highways were not so stated:—

Held—(1.) that the plan did not sufficiently "describe the old and proposed new highways by admeasurement thereof," and that the quarter sessions were consequently right in refusing to enrol the certificate; (2.) that, even if they had been wrong, mandamus would not lie under the circumstances to compel them to enrol it. THE KING *v.* SURREY JUSTICES - **Div. Ct. 374**

HIGHWAY—*continued.*

2. —— *Extraordinary Traffic—Light Locomotive—Summary Proceedings—Transfer of Jurisdiction of Justices—Jurisdiction of County Court—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 1, *sub-s.* 1; *s.* 6, *sub-ss.* 1, 2; *Schedule—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1; *s.* 17, *sub-s.* 2—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 12, *sub-s.* 1; *s.* 20, *sub-s.* 3—*Heavy Motor Car Order*, 1904, *arts.* 2, 3.

An action lies in the county court to recover expenses of extraordinary traffic not exceeding 250*l.* caused by light locomotives within the meaning of s. 1 of the Locomotives on Highways Act, 1896, as extended by the Heavy Motor Car Order, 1904, inasmuch as expenses of extraordinary traffic not exceeding 250*l.* ceased by virtue of s. 12, sub-s. 1, of the Locomotives Act, 1898, to be recoverable summarily under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, and became recoverable in the county court; and s. 17, sub-s. 2, of the Locomotives Act, 1898, means that nothing in that Act is to affect light locomotives as distinguished from other vehicles, but it does not mean that light locomotives, as far as they have characteristics in common with other vehicles (one of which is that they may cause extraordinary traffic), are not to be dealt with by the new procedure established by s. 12, sub-s. 1, of the Locomotives Act, 1898. THE KING *v.* JUDGE JAMES AND MIDLAND RAILWAY COMPANY. *Ex parte* BATH RURAL COUNCIL - - **Div. Ct. 958**

3. —— *Extraordinary Traffic—Repair of Highway—Recovery of Expenses—Limitation of Time for bringing Action—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

A municipal corporation requiring road material for the general purposes of the maintenance and construction of roads within their district entered into contracts with two contractors whereby the contractors agreed to supply and deliver to the corporation, during the twelve months from March 31, 1904, to March 31, 1905, flints and ragstone, in such quantities and numbers, at such times and in such manner as the corporation should from time to time by order in writing direct. The plaintiffs, as the authority liable for the repair of highways in their district, incurred extraordinary expenses in repairing a highway in consequence of damage done to it by extraordinary traffic conducted over it in the haulage of stones by the contractors for the fulfilment of their contracts with the corporation. The last load of stones was carried on March 31, 1905, and on August 22, 1905, the plaintiffs commenced an action against the corporation for the recovery of the extraordinary expenses:—

Held, that the traffic was conducted in consequence of the orders of the corporation.

Held, also (reversing the decision of Walton J., [1907] 2 K. B. 39), that the damage was not the consequence of "any particular building contract or work extending over a long period" within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, and that therefore, under

HIGHWAY—*continued.*
the first part of that sub-section, the plaintiffs could recover only the expenses incurred within twelve months before the commencement of the action. BROMLEY RURAL DISTRICT COUNCIL *v.* CROYDON CORPORATION - - **C. A. 353**

4. —— *Licence to Surveyor to take Materials from enclosed Lands for Repair of Highways—Excepted Lands—Jurisdiction of Justices—Time for which Licence may be granted—Highway Act*, 1835 (5 *& 6 Will.* 4, *c.* 50), *ss.* 53, 54.

By the joint effect of ss. 53 and 54 of the Highway Act, 1835, the justices may license the surveyor of highways to take materials for the repair of the highways "at such time or times as to such justices shall seem proper" from the enclosed lands of any person, "such lands . . . . not being a . . . . park."

On an application by a surveyor of highways for a licence under those sections the justices made an order authorizing him to take materials for a period of five years from certain enclosed land which in the opinion of the High Court was a park :—

Held—(1.) that the question whether the land was a park or not was one which was preliminary to the exercise of the jurisdiction given by the statute, and that the justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter;

(2.) That a licence, to be valid, must not purport to operate for a longer period than is necessary for the execution of the repairs, and that the licence, being for a period of five years without reference to the necessities existing at the date of its grant, was bad. THE KING *v.* BRADFORD - - - - - **Div. Ct. 365**

5. —— *Obstruction of Highway—Indictable Nuisance—What amounts to.*

The defendant unlawfully erected and maintained in the middle of the roadway of a public street a coffee-stall. The stall was of a permanent character, having gas and water laid on to it from the mains, and being assessed to the rates at 32*l.* There was sufficient room for the passage of traffic up and down the street on either side of the stall. On an indictment of the defendant for a nuisance in thereby obstructing the highway, the jury found that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street :—

Held, that the findings did not justify the entry of a verdict of guilty. THE KING *v.* BARTHOLOMEW - - - - - **C. C. R. 554**

HIRE AND PURCHASE AGREEMENT—Trade fixtures—Right of mortgagee against owner of fixtures—Mortgagor in possession - - - - - **388**
See MORTGAGE.

HIRING AGREEMENT — Distress — Landlord and tenant—Trade fixtures—Gas engine
See DISTRESS. **86**

HOTEL—Lodger at—Arriving drunk—Admission of after closing hours - - **905**
See LICENSING ACTS. 3.

HUSBAND AND WIFE—*Guarantee signed by Wife for Debt of Husband—Influence of Husband—Sufficient Explanation of Document not given to Wife—Notice to Creditor of Relationship—Creditor procuring Guarantee through Husband.*

The plaintiffs, having agreed to supply goods to the defendant's husband on credit if his wife would guarantee payment by him of their price, sent to the husband a form of guarantee, in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guarantee, without sufficiently explaining to her the nature of the document, which she did not understand when she signed it. Goods having been supplied by the plaintiffs to the defendant's husband, the price of which was not paid, the plaintiffs sued the defendant on the guarantee.

Held, that the action was not maintainable.

Bischoff's Trustee v. *Frank*, (1903) 89 L. T. 188, and *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, followed. CHAPLIN & CO., LD. *v.* BRAMMALL - - - - - - **C. A. 233**

—— Bankruptcy—Set-off—Gift of money by bankrupt to wife - - - **174**
See BANKRUPTCY. 3.

—— Breach of promise of marriage—Married man—Contract—Public policy
See MARRIAGE. 1, 2. **720, 729**

INCOME TAX—Exemption — Existing tax — Thames Conservancy - - - **893**
See REVENUE. 2.

INCORPORATED COMPANY.
See under COMPANY.

INDEMNITY—Contract of—Common interest—Trade rivals—Protection of customers.
See MAINTENANCE OF SUIT. **1006**

INDIA — Bankruptcy — Firm bankrupt in England and in India—Agreement for pooling and distributing the assets—Sanction of Court—Jurisdiction - **675**
See BANKRUPTCY. 2.

INDICTMENT—Pleading—Sufficiency of averments - - - - - - **617**
See CRIMINAL LAW.

INFRINGEMENT—Copyright.
See under COPYRIGHT.

—— Trade mark.
See under TRADE MARK.

INJUNCTION—County court—Costs — Scale — Claim for injunction - - - **109**
See COUNTY COURT. 1.

INLAND REVENUE.
See under REVENUE.

INSURANCE, FIRE—Discovery—Ship's papers
See PRACTICE. 5. **1032**

INSURANCE, LIFE—*Fraud of Insurance Agent—Avoidance of Policy—Recovery back of Premiums.*

By a policy of life insurance the defendants, in consideration of the payment by the plaintiff of a weekly premium, contracted to pay to the plaintiff a certain sum upon the death of a third

INSURANCE, LIFE—*continued.*

person. After the policy had been on foot for a year the plaintiff proposed to let it lapse, whereupon the defendants' agent, with the view of inducing her to continue the payment of the premiums, falsely, and without the authority of the defendants, represented to her that if she continued paying the premiums for four more years she would be entitled to a free policy, that is to say, that, though the policy would remain in force, she would on the expiration of that period have no further premiums to pay. Relying on that representation, she continued to pay the premiums for the further period of four years, but on the expiration of that period the defendants refused to give her a free policy. The plaintiff sued to recover back the premiums paid by her since the date of the false representation made :—

Held by Lord Alverstone C.J. and Sir Gorell Barnes, President (Buckley L.J. dissenting), that, the contract contained in the policy being under the circumstances voidable at the plaintiff's option, the fact that the defendants had during the whole of the four years been subject to a risk of having to pay the sum assured in the event of the life dropping during that period did not amount to a part performance of the contract, so as to bar the plaintiff from the exercise of her option to avoid it, and that the premiums consequently could be recovered back as money had and received to her use.

Held by Lord Alverstone C.J., that the amount of the premiums could also be recovered as damages in an action of deceit.

Held by Buckley L.J., that it could be recovered as money obtained for the defendants by the fraud of their agent.

Judgment of a Divisional Court (Phillimore and Bray JJ.), [1907] 2 K. B. 242, affirmed. KETTLEWELL *v.* REFUGE ASSURANCE COMPANY - - - - - - - **C. A. 545**

INSURANCE, MARINE — *Charterparty — Freight—Loss—Saving of Charterparty Hire—Commission.*

Appeal from a decision of Channell J., whose judgment on two of the questions raised in the action is reported [1907] 1 K. B. 259. The sole question argued and decided on the appeal was one of fact, and the case, therefore, does not call for a report.

The Court dismissed the appeal. UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION - - **C. A. 115**

2. —— *Warranty against "Contraband of War"—Contraband Persons—Breach of Warranty.*

The transport of military officers of a belligerent State as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance. YANGTSZE INSURANCE ASSOCIATION *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY - - - - - **Bigham J. 910**

3. —— *Warranty of Freedom from Capture —Capture of Neutral Ship by Belligerents—Subsequent Loss by Perils of the Sea—Condemnation—Relation back of Title of Captors.*

A neutral ship carrying a cargo of contraband

INSURANCE, MARINE—*continued.*

destined for the ports of one belligerent was captured by a cruiser of the other belligerent, and while being navigated by the captors towards a prize court was wrecked and became a total loss. She was afterwards condemned by the prize court as a lawful prize. The owner had effected a time policy on disbursements in respect of the ship. By the terms of the policy the disbursements were to be deemed to be totally lost if and when the ship was totally lost; and it was "warranted free from capture, seizure and detention, and the consequences of hostilities." In an action against an underwriter of the policy Channell J. held, [1907] 2 K. B. 248, that, although the capture did not of itself divest the owner's property in the ship, the subsequent condemnation caused the title of the captors to relate back to the date of the capture, so that the owner had no insurable interest in her at the time she was wrecked, and accordingly could not recover on the policy.

On appeal from that decision :—

Held that, as between the owner and the insurer, the question of relation back of the captor's title was immaterial, the true view of the facts being that the owner had lost his ship by capture and the captors had lost their prize by shipwreck, and, loss by capture being excepted from the policy, the owner could not recover.

Decision of Channell J. affirmed.

In the case of the seizure of an enemy's vessel, the subsequent condemnation by a prize court divests the property of the owner as from the date of the seizure.

Semble, that the same rule applies in the case of seizure of a neutral vessel. ANDERSEN *v.* MARTEN - - - - - - **C. A. 601**

JUDGMENT — County court — Costs — Scale — Claim for injunction — Judgment on alternative claim for sum not exceeding 10*l.* - - - - - - - **109**
See COUNTY COURT. 1.

—— Execution by fieri facias—Money belonging to judgment debtor—Death of judgment debtor before seizure by sheriff—Administration order - - - **1**
See SHERIFF.

—— Foreign judgment—Jurisdiction of foreign Court—Contract of partnership abroad —Partner resident in England - **302**
See FOREIGN JUDGMENT.

JUDICATURE ACT—Appeal—"Criminal cause or matter" — Distress—Bailiff—Costs and charges - - - - - **672**
See PRACTICE. 2.

—— Receiver — Public-house — Licences in jeopardy — Landlord and tenant — Recovery of possession - - **79**
See RECEIVER.

JURISDICTION—Audit of accounts—Auditor—Surcharge—Certiorari to quash—Jurisdiction of Court - - - - **407**
See LOCAL GOVERNMENT. 1.

——Bankruptcy.
See under BANKRUPTCY.

JURISDICTION—*continued.*

——Board of Education, Decision of—Jurisdiction of Court—Injunction - - **685**
See SCHOOLS. 2.

——County Court—Staying proceedings where submission to arbitration - - **403**
See COUNTY COURT. 2.

——Foreign Court — Foreign judgment—Contract of partnership abroad—Partner resident in England - - - **302**
See FOREIGN JUDGMENT.

——Highway—Extraordinary traffic—Summary proceedings—Transfer of jurisdiction of justices—Jurisdiction of county court
See HIGHWAY. 2. **958**

——Highway — Licence to surveyor to take materials from enclosed lands for repair of highways—Jurisdiction of justices
See HIGHWAY. 4. **365**

JUSTICES—Costs of proceedings before justices —Solicitor—Bill of costs - **590**
See SOLICITOR. 1.

—— Councillor — Disqualification — Paid office under the council - - - **858**
See LOCAL GOVERNMENT. 2.

—— Criminal law — Pleading — Indictment — Sufficiency of averments - - **617**
See CRIMINAL LAW.

—— Drains.
See under SEWERS.

—— Highway—Diversion—Sufficiency of plan
See HIGHWAY. 1. **374**

—— Highway — Extraordinary traffic — Summary proceedings - - - **958**
See HIGHWAY. 2.

—— Highway—Licence to surveyor to take materials from enclosed lands for repair of highway — Jurisdiction of justices
See HIGHWAY. 4. **365**

—— Highway — Obstruction of — Indictable nuisance—What amounts to - **554**
See HIGHWAY. 5.

—— Land drainage—Neglect to clean and scour channel—Injury to other land—Water mill - - - - - - - **485**
See LAND DRAINAGE.

—— Licensing Acts.
See under LICENSING ACTS.

—— Poor rate.
See under RATES.

—— Practice — Appeal — "Criminal cause or matter"—Distress—Bailiff—Costs and charges - - - - - - **672**
See PRACTICE. 2.

—— Rates.
See under RATES.

—— Revenue—Male servants—Persons employed in trading establishments - - **705**
See REVENUE. 3.

—— Sewers.
See under SEWERS.

JUSTICES—*continued.*

—— Waterworks — Insufficiency of supply — Penalty - - - - - **917**
See WATERWORKS. 2.

—— Weights and measures.
See under WEIGHTS AND MEASURES.

LAND DRAINAGE—*Neglect to clean and scour Channel—Injury to other Land—Water Mill—Land Drainage Act*, 1847 (10 *&* 11 *Vict. c.* 38), *ss.* 14, 15.

By the Land Drainage Act, 1847, where by reason of the neglect of an occupier of land to cleanse and scour the channel of a stream lying in or bounding his land injury is caused to any other land, the occupier of that land, after due notice, may take steps to cleanse and scour the channel, and recover the expense from the occupier whose neglect has caused the injury.

The respondent was the owner of a water mill, and in consequence of the neglect of the appellant, who was the occupier of the adjacent land, through which the water passed after it had gone over the mill wheel, to cleanse and scour the channel of the stream, the water was penned back so as partially to submerge the mill wheel. Proceedings having been taken under the Land Drainage Act, 1847:—

Held, that the provisions of the Act were confined to injury done to agricultural land, and did not apply where the injury complained of was injury to a mill. FINCH *v.* BANNISTER
Div. Ct. 485

LAND TAX—Lease—Covenant by lessor to pay land tax—Construction—Value of land improved by building - - - **71**
See LANDLORD AND TENANT. 3.

LANDLORD AND TENANT—*Covenant not to assign without Consent—Payment for Leave to assign—Lease—"Fine or Sum of Money in the Nature of a Fine"—Conveyancing and Law of Property Act*, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing Act, 1892, does not make illegal the payment and acceptance of a fine for the lessor's consent to the assignment of a lease which contains a covenant against assignment without consent. If such a payment is made by a lessee, not under protest, he cannot recover it back. If consent is refused except on payment, the lessee is entitled to disregard the covenant and assign without consent.

Decision of Channell J., [1907] 2 K. B. 494, affirmed. ANDREW *v.* BRIDGMAN - **C. A. 596**

2. ——*Covenant running with the Land—Covenant by Lessor to perform Covenants of Head Lease—Collateral Covenant.*

A lease for a term of years of certain land contained a covenant by the lessee to keep in repair all buildings erected on the land, and a proviso for re-entry for breach of that covenant. Two hundred and eleven houses were erected on the land. An underlease was granted of two of the houses, and the underlessor covenanted for himself and his assigns with the underlessee and his assigns for the performance of the covenants of the superior lease so far as they related to the premises comprised in the superior lease but not demised by the underlease. The plaintiff was

LANDLORD AND TENANT—*continued.*

the assignee of the underlease, and the land demised by the superior lease, including the land demised by the underlease, became vested in the defendant for the residue of the term, subject to the underlease. The superior lessor re-entered on all the land demised by the superior lease in consequence of the defendant's failure to perform the covenant to repair in that lease, and ejected the plaintiff from the two houses demised by the underlease. The plaintiff sued the defendant, in respect of this ejectment, for damages for breach of the covenant in the underlease :—

Held (affirming the judgment of Jelf J., [1907] 1 K. B. 612), that the action was not maintainable, for the covenant to perform the covenant in the superior lease relating to premises not demised by the underlease, being a covenant not to be performed on the demised premises, was only a collateral covenant, and therefore not binding on the assigns of the underlessor, though named.

Doughty v. *Bowman*, (1848) 11 Q. B. 444, discussed.

Sampson v. *Easterby*, (1829) 9 B. & C. 505; (1830) 6 Bing. 644, distinguished. DEWAR *v.* GOODMAN - - - - - - - **C. A. 94**

3. ——*Land Tax—Lease—Covenant by Lessor to pay Land Tax—Construction—Value of Land improved by building.*

Where in a lease of premises at a ground rent the lessors covenanted to pay the land tax chargeable on the demised premises :—

Held, that the covenant must be construed as referring only to so much of the total land tax chargeable on the premises as was proportionate to the benefit derived therefrom by the lessors, i.e., the amount of the ground rent.

Watson v. *Home*, (1827) 7 B. & C. 285, and *Smith* v. *Humble*, (1854) 15 C. B. 321, followed. MANSFIELD *v.* RELF - - - - - **C. A. 71**

—— Corporation—Dissolution—Bona vacantia — Chattels real — Limited company lessees—Sureties for payment of rent during the term—Lease - - **378**
See CORPORATION.

—— Death of lessee—Administrator ad colligenda bona—Power to sell—Entry into possession—Rent - - - - **151**
See ADMINISTRATION.

—— Receiver — Public-house — Licences in jeopardy—Recovery of possession **79**
See RECEIVER.

LANDS CLAUSES ACTS—*Notice to Treat—Creation of New Interest—Agreement for Tenancy—Surrender—New Agreement—Compensation—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 18.

On May 15, 1905, the defendants served upon the landlords of certain premises a notice to treat for the purchase thereof, the premises then being in the occupation of a tenant under an agreement in writing for a term of three years from March 14, 1905. After negotiations for a transfer of the tenancy to the plaintiff, ultimately, on February 14, 1906, the landlords, with the concurrence of the tenant, agreed to let to the plaintiff, who agreed to take the premises for a term of three years from that date on conditions in other respects similar to those of the former tenancy. The defendants, without notice to the plaintiff or to the former tenant, entered upon the premises and deprived the plaintiff of the use thereof.

In an action of trespass by the plaintiff against the defendants it was agreed that the question to be tried should be whether the plaintiff was a person entitled to compensation under the Lands Clauses Consolidation Act, 1845, in respect of his tenancy :—

Held that, notwithstanding the surrender by operation of law of the former tenancy and the creation by the landlords after notice to treat of a new tenancy in the plaintiff, the latter was nevertheless entitled to compensation in respect of his interest in the premises during the period ending March 14, 1908, inasmuch as the new tenancy did not as regards that period impose any additional burden upon the defendants. ZICK *v.* LONDON UNITED TRAMWAYS, LD. **Jelf J. 611**

LAY DAYS—Ship—Charterparty—Demurrage—Arrival at place of loading - - **499**
See SHIPPING. 4.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Mining lease.
See under MINES.

LIBEL—Absolute privilege—Report of official receiver under Companies (Winding-up) Act, 1890 - - - - - **584**
See DEFAMATION.

LICENCE—Highway, Licence to surveyor to take materials from enclosed lands for repair of—Time for which licence may be granted - - - - - **365**
See HIGHWAYS. 4.

LICENCES.
See under LICENSING ACTS.

LICENSING ACTS—*Conditional Licence—Hours of opening—Application for occasional Licence—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4; *Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 29.

The respondent was granted in 1906, under s. 4 of the Licensing Act, 1904, a licence in respect of certain premises for the period of two years upon the condition that the premises should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. During the currency of the licence the respondent applied to the justices in petty sessions, under s. 29 of the Licensing Act, 1872, for an occasional licence exempting him from closing the premises on December 17, 1906, between the hours of 7 P.M. and 11 P.M. The justices granted the occasional licence asked for :—

Held (affirming the decision of a Divisional Court, [1907] 2 K. B. 232), that they had power to do so. GROH *v.* HESKETH - - **C. A. 654**

2. —— *Extinction of Licence—Compensation—Division of Compensation Money among Parties interested—Principle of Computation—*

LICENSING ACTS—*continued.*

Determination by County Court — Appeal — Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where a county court judge exercises the jurisdiction conferred by s. 2, sub-s. 3, of the Licensing Act, 1904, an appeal lies from his decision.

The respondents, brewers, were tenants to the appellants of certain licensed premises at a peppercorn rent. The lease contained no covenant by the tenants to keep the licence on foot. While the lease had still some years to run the licence was extinguished under the Licensing Act, 1904, and the aggregate amount of the compensation for non-renewal payable to the parties interested in the licensed premises was determined by the Commissioners of Inland Revenue. On an inquiry before the county court judge as to the proportion in which the respondents and the appellants respectively were entitled to share in that money, evidence was given that, in the absence of any special circumstances, the average price paid for freehold licensed premises in the open market represented twenty-five years' purchase of the rental value. Evidence was also given that the respondents had upon an average of years made at least 8 per cent. profit on the beer supplied by them to the house. The judge held that, having regard to the profits which the respondents had lost, it was reasonable to calculate the present values of the parties' respective interests upon the 8 per cent. interest table, and he accordingly awarded to the respondents a sum equal to the present value of an annuity for the residue of the lease of such an amount as would represent the interest on the compensation money if invested at 8 per cent., and he awarded to the appellants the balance, namely, a sum which, if invested at 8 per cent. and allowed to accumulate at compound interest during the residue of the lease, would be equal to the amount of the compensation money. On appeal :—

Held, that the rate of profits which the respondents had previously made was not material to the inquiry, and that the judge, in computing the values of the parties' interests upon the 8 per cent. table, had acted on a wrong principle ; that the absence of a covenant to keep the licence on foot did not expose the licence, or the appellants' interest in it, to any unusual risk ; and that, there being no reason to suppose that the property would depreciate during the lease, the 4 per cent. interest table was the proper one on which to compute the parties' respective shares in the compensation money. LIVERPOOL CORPORATION *v.* PETER WALKER & SON, LD. - - **Div. Ct. 28**

3. —— *Permitting Drunkenness—Lodger at Hotel—Arrival of Lodger in Condition of Drunkenness—Admission of, after closing Hours—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 13—*Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 4.

Premises licensed for the sale of intoxicating liquors do not during the hours when they are closed to the public cease to be licensed premises for the purposes of s. 13 of the Licensing Act, 1872, even as regards lodgers upon the premises.

A guest arrived at an hotel after the closing hour and engaged a bedroom. At the time of his doing so he was drunk to the knowledge of the hotel manager. He was shortly afterwards found drunk upon the premises by a constable :—

Held that, as by s. 18 a licensed person may refuse to admit to and may turn out of the premises any person who is drunk, the hotel proprietor was liable to be convicted under s. 13 of permitting drunkenness upon his premises, he being unable under the circumstances to discharge the onus cast upon him by s. 4 of the Licensing Act, 1902, of shewing that he took all reasonable steps for preventing drunkenness upon the premises. THOMPSON *v.* MCKENZIE **Div. Ct. 905**

4. —— *Renewal of Licence—Reference to Quarter Sessions—Report of Licensing Justices —Matters not stated in Report—Evidence—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

On the hearing by a committee of quarter sessions of an application for the renewal of a licence which has been referred to quarter sessions by the licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, evidence as to the structural condition and the state of repair of the premises in question is admissible for the purpose of differentiating the premises from other licensed premises in the neighbourhood, although there is no mention of those subjects in the report of the licensing justices.

So *held*, affirming the judgment of a Divisional Court, [1907] 2 K. B. 340. HOWE *v.* NEWINGTON LICENSING JUSTICES - **C. A. 260**

—— Distress—Trade fixtures—Hiring agreement —Gas engine - - - - - **86**
See DISTRESS.

—— Rates—Licensed premises—Compensation charge - - - - - - - **642**
See RATES. 2.

LIEN—Solicitor — Lien on client's papers for costs—Acceptance of securities—Duty of solicitor - - - - - - **473**
See SOLICITOR. 3.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT—*Prescription—Dominant and Servient Tenements united in One Freeholder — Extinguishment of Easement—Prescription Act*, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

Unity of seisin for an estate in fee will not cause an easement of ancient light to be extinguished where there is no unity of possession and enjoyment.

A tenement which had enjoyed the access and use of light over an adjoining tenement for a period of twenty years without interruption was leased for a term of years to the plaintiffs. Subsequently and during the continuance of this term the freeholder conveyed the tenement in fee to the freeholder of the servient tenement :—

Held, that the easement acquired by the tenement under s. 3 of the Prescription Act, 1832, was not thereby extinguished. RICHARDSON *v.* GRAHAM - - - - **C. A. 39**

LIGHTER — Ship — Dock Company — Exemption from dock rates — West India Dock - - - - - - - **786**
See SHIPPING. 6.

LIMESTONE — Compensation — Railway company—Limestone required to be left unworked - - - - - - **925**
See MINES. 1.

LIMITATION—Time for bringing action—Highway, Repair of—Extraordinary traffic —Recovery of expenses - - **353**
See HIGHWAY. 3.

LIMITATION OF LIABILITY—Ship—Bill of lading—Loss due to shipowner's negligence - - - - - - - **796**
See SHIPPING. 3.

LOCAL AUTHORITY.
See under LOCAL GOVERNMENT.

LOCAL GOVERNMENT — *Auditor — London—Metropolitan Borough—Audit of Accounts — Auditor — Powers and Duties — Surcharge — Certiorari to quash—Jurisdiction of Court—London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 14—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 35.

On an application for a certiorari under s. 247, sub-s. 8, of the Public Health Act, 1875, to remove and quash disallowances and surcharges made by an auditor acting in pursuance of that section, the jurisdiction of the Court is not confined to error in point of law, but extends to error in point of fact.

So *held* by the Court of Appeal, affirming the decision of the Divisional Court, [1907] 2 K. B. 878.

Reg. v. *Haslehurst*, (1887) 51 J. P. 645, followed and approved.

Per Cozens-Hardy M.R. and Farwell L.J.: An auditor appointed by the Local Government Board under s. 247 of the Public Health Act, 1875, to audit the accounts of a metropolitan borough council is authorized and required by sub-s. 7 to decide whether any member or officer of the council has been guilty of negligence or misconduct in relation to the accounts whereby loss has been occasioned to the council, and to assess the amount of the loss.

Per Fletcher Moulton L.J.: The powers and duties of the auditor under sub-s. 7 of s. 247 are strictly confined to auditing, and the words "person accounting" in the latter part of that sub-section, which requires the auditor to "charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person," mean the person who brings in accounts for audit. Therefore, where the accounts submitted for audit are the accounts of a metropolitan borough council, the person accounting is the council, and the auditor has no power to inquire into the negligence or misconduct of the individual members or servants of the council. THE KING *v.* CARSON ROBERTS - - - - **C. A. 407**

2. —— *Councillor—Urban District Councillor —Disqualification—Paid Office under the Council —Distress Committee—Registrar and Inquiry Agent—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 46, *sub-ss.* 1, 8 — *Unemployed Workmen Act*, 1905 (5 *Edw.* 7, *c.* 18).

By s. 46 of the Local Government Act, 1894, a person is disqualified for being a member of a district council if he holds any paid office under the council.

A distress committee established for an urban district under the Unemployed Workmen Act, 1905, and the Urban Distress Committees (Unemployed Workmen) Order, 1905, is by virtue of that Act and Order constituted a committee of the council of the urban district for which it is established; and a person who holds a paid office under such a committee holds a paid office under the district council within the meaning of s. 46 of the Local Government Act, 1894. CRUMP *v.* LEWIS - **Div. Ct. 858**

3. —— *Plans—Malicious Refusal of Local Authority to approve—Action.*

An action will not lie against a local authority for maliciously refusing to approve of building or drainage plans deposited with them. If the local authority in rejecting the plans has been actuated by improper motives, and has merely pretended to exercise its power without addressing its mind to the question before it, the remedy of the person aggrieved is by a mandamus to the local authority to hear and determine his application. DAVIS *v.* BROMLEY CORPORATION - - - **C. A. 170**

—— Drains.
See under SEWERS.

—— Sewers.
See under SEWERS.

LOCOMOTIVES — Extraordinary traffic — Summary proceedings - - - **958**
See HIGHWAY. 2.

—— Highway, repair of—Extraordinary traffic —Recovery of expenses—Limitation of time for bringing action - - **353**
See HIGHWAY. 3.

LODGER—At hotel — Arriving drunk — Admission of after closing hours - - **905**
See LICENSING ACTS. 3.

LONDON—*Drain or Sewer—Nuisance—"Intimation" Notice—Service on Person not Liable—Compulsion — Recovery of Expense of abating Nuisance.*

A nuisance having arisen from the obstruction of a pipe which carried off the drainage from the plaintiffs' premises, the defendants' sanitary inspector served on the plaintiffs an "intimation" notice under the Public Health (London) Act, 1891, requiring them to abate the nuisance. The plaintiffs contended, and it was the fact, that the pipe was a sewer, and therefore repairable, not by them, but by the defendants; but the plaintiffs did the work necessary to abate the nuisance under protest, and sued the defendants to recover the expense incurred by them in so doing as money paid by them under compulsion which the defendants were compellable to pay:—

Held, that the plaintiffs were entitled to recover.

Oliver v. *Camberwell Borough Council*, (1904)

LONDON—*continued.*

68 J. P. 165, distinguished. WILSON'S MUSIC AND GENERAL PRINTING COMPANY *v.* FINSBURY BOROUGH COUNCIL - **Channell J. 563**

2. —— *Flats—"Houses or Buildings let out in Separate Tenements" — Rateable Value — Deductions from Gross Value — Poor Rate — Valuation — Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *Sched. III.*

By s. 52 of the Valuation (Metropolis) Act, 1869, it is enacted that in calculating the rateable value of hereditaments for the purposes of the Act the percentage or rate of deductions to be made from the gross value is not to exceed the amounts in the Third Schedule to the Act.

The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list in the metropolis are to be divided, contains in a footnote a provision to the effect that the maximum rate of deductions prescribed therein shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and the general principles of law.

W. was the owner and occupier of a building in the metropolis consisting of two shops on the ground floor, a flat on the first floor extending over both the shops, and two similar flats on the second and third floors. Each shop consisted of one room with a yard and small offices in the rear and a basement. Each flat consisted of a suite of rooms reached by a common staircase approached from the street by a passage at the side of one of the shops. Each flat had its own outer door opening on to the staircase. The passage way had a door opening on to the street. The two shops and three flats were five separate rateable hereditaments :—

Held, that the building was a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act, notwithstanding that the shops and flats were separate rateable hereditaments ; and that therefore, in arriving at the rateable values of the shops and flats, the assessment committee might allow deductions from the gross values at a rate greater than the maximum rate of deductions specified in the Third Schedule.

Decision of a Divisional Court, [1907] 2 K. B. 323, affirmed. WESTERN *v.* KENSINGTON ASSESSMENT COMMITTEE - - **C. A. 811**

—— Auditor—Powers and duties—Surcharge—Certiorari to quash — Jurisdiction of Court - - - - - - - **407**
See LOCAL GOVERNMENT. 1.

LONDON AND BIRMINGHAM RAILWAY COMPANY ACT, 1833 - - - **925**
See MINES. 1.

LOUGHBOROUGH CORPORATION—Electricity
See STATUTE. **205**

MAINTENANCE OF SUIT—*Common Interest—Trade Rivals—Protection of Customers—Contract of Indemnity.*

The plaintiffs and the defendants were rival manufacturers of an apparatus for conveying cash from one part of business premises to another. The defendants obtained contracts for the hire of their apparatus from three of the plaintiffs' customers, who were under contracts to use the plaintiffs' apparatus at the time, and they agreed to indemnify the customers against any claims by the plaintiffs against them for breach of contract. Two of these customers were originally customers of the defendants, and the third gave a contract to the plaintiffs in the belief that he was dealing with the defendants. The plaintiffs in each case sued the customer for breach of contract and in two instances recovered damages and costs, which the defendants paid under their contract of indemnity. The plaintiffs claimed relief against the defendants on the ground of maintenance :—

Held, that the defendants in giving these contracts of indemnity were acting in the legitimate defence of their commercial interests and were not liable for maintenance. BRITISH CASH AND PARCEL CONVEYORS, LD. *v.* LAMSON STORE SERVICE COMPANY, LD. - **C. A. 1006**

MALE SERVANTS—Persons employed in trading establishment - - - - - **705**
See REVENUE. 3.

MALICE — Plans — Malicious refusal of local authority to approve—Action - **170**
See LOCAL GOVERNMENT. 3.

MANAGER—Bankruptcy — Special manager—Default in accounting—Four-day order—Jurisdiction - - - - - **204**
See BANKRUPTCY. 5.

MANORIAL MARKET—Estate of franchise—New streets—Dedication—Presumption
See MARKET. **115**

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARKET—*Manorial Market—Extent of Franchise—New Streets—Dedication—Presumption.*

There was in the parish of Whitechapel, which was included in the manor of Stepney, an ancient manorial market without metes and bounds, which was held in a street called High Street. There was evidence from which it might be inferred that the right to hold the market extended to holding it in streets adjoining High Street, when that street was overcrowded. Under an Act of Parliament passed in 1840 two new streets were made adjoining High Street on ground that included the sites of pre-existing streets which adjoined that street. Under an Act of Parliament passed in 1865 another new street, by which an existing street was connected with High Street, was made upon ground previously covered with houses. These streets were all in the parish of Whitechapel. The Acts under which they were respectively made provided that, when the streets were made, the ground laid open into them should form part of the streets, and should be used by the public accordingly. There was evidence that the streets so made had been for many years used for the purposes of the market without interference by the highway authority :—

Held by Vaughan Williams L.J. and Buckley L.J., that the right to hold the market extended to holding it in these streets, when

MARKET—*continued.*
High Street was overcrowded, and that the statutory dedication of them as highways must be taken to be subject to the user of them for the purposes of the market.

Fletcher Moulton L.J. dissented, on the ground that in his view the facts of the case did not justify the inference that there was a prescriptive right to hold the market in any other street than High Street, and that the statutory dedication of the new streets was absolute, and not subject to any right of using them for the purposes of the market.

Judgment of Swinfen Eady J., [1906] 2 K. B. 468, affirmed subject to a slight variation of the declaration made by the order. GINGELL, SON & FOSKETT, LD. *v.* STEPNEY BOROUGH COUNCIL **C. A. 115**

MARRIAGE—*Breach of Promise of Marriage—Contract—Promise to Marry on Death of Wife—Knowledge of Promisee—Public Policy.*

The defendant, who was to the knowledge of the plaintiff a married man, promised to marry the plaintiff on the death of his wife. He did so with the intention, known to the plaintiff, of inducing her to commit adultery with him, and she did so after the promise and before the death of the defendant's wife :—

Held, that such a promise was contrary to public policy and could not be enforced. SPIERS *v.* HUNT - - - - **Phillimore J. 720**

2. —— *Breach of Promise of Marriage—Contract—Promise to Marry on Death of Wife—Knowledge of Promisee—Public Policy.*

A promise of marriage made by a man who to the knowledge of the promisee was at the time of the making of the promise married is void as being against public policy, and therefore cannot be enforced by action after the death of the promisor's wife. WILSON *v.* CARNLEY **C. A. 729**

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER — Assault — Schoolmaster — Right of assistant teacher in public elementary school to inflict corporal punishment—School regulations - - - **947**
See ASSAULT.

—— Endowed schools — Assistant master—Scheme—Wrongful dismissal - **63**
See SCHOOLS. 1.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

—— Schools.
See under SCHOOLS.

MEASURES—Weights and.
See under WEIGHTS AND MEASURES.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MILL—Water mill—Neglect to clean and scour channel—Injury to other land - **485**
See LAND DRAINAGE.

MINES — *Compensation — Railway Company—Limestone required to be left unworked—London and Birmingham Railway Company Act*, 1833 (3 *Will.* 4, *c.* xxxvi.), *ss.* 55, 58—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

Under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, a claimant is entitled to compensation in respect of minerals which the railway company requires to be left unworked, on the basis of the value of the property to him. In many cases this value is much larger than the market value, but when he claims some special value all the circumstances, including any which tend to reduce the value to him to the market value or to something very little above it, must be looked at.

A railway company gave two notices to treat under s. 55 of 3 Will. 4, c. xxxvi. (which for the purposes of his judgment was taken by Bray J. to be in the same terms as s. 78 of the Railways Clauses Consolidation Act, 1845), to the claimants, who were the owners in fee simple of land adjoining the railway and of limestone and minerals thereunder and under the railway, requiring them not to work the portions of the limestone and minerals mentioned in the two notices respectively. The claimants had erected a cement manufactory on their land, and were quarrying the limestone thereunder and manufacturing it into cement. The limestone including the stone the subject of the first notice to treat, called "the first notice stone," was near to but not under the railway, and the stone the subject of the second notice to treat, called "the second notice stone," was under the railway. The stone including that the subject of the notices, allowing for considerable increase in the claimants' business, was sufficient for the purposes of their cement manufactory for a period greatly exceeding twelve years from the date on which the notices to treat were given. The limestone not included in the notices to treat was equally convenient and accessible to the claimants as the first and second notice stone. The claimants in the ordinary and reasonable course of quarrying would, but for the notices to treat, have worked and used the first and second notice stone in their manufactory during a period of twelve years from the date of the notices, and would have made thereby considerable profits. By reason of the notices to treat and the fetter thereby attached to the first and second notice stone, the claimants, for the purposes of their business, had recourse to and worked the stone not fettered by the notices to treat, and were in a position to make the same profits thereout until it was exhausted as if they had been able to work the first and second notice stone. Other limestone than the claimants' could be purchased in the neighbourhood. Their business would not be substantially affected by compliance with the notices :—

Held that, in determining the compensation payable by the railway company in respect of the limestone they required to be left unworked, the fact that the claimants had large quantities of other stone equally convenient and accessible, and that in the ordinary course of working they

MINES—*continued.*
would have sufficient stone for a large number of years, and that the loss of this stone would only affect them after a long period of years, ought to be taken into consideration, and that, taking into account those facts, the price the claimants would have to pay for other limestone plus any extra cost of carriage represented the special value of the stone to the claimants.

Held, further, that ss. 55 and 58 of 3 Will. 4, c. xxxvi., must be read together, and that their effect was that the claimants might get their minerals by any way other than by means of a shaft, pit, or quarry on the surface. They might let the surface down, but must only have underground workings, not above-ground workings. RUGBY PORTLAND CEMENT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **Bray J. 925**

2. —— *Covenant — Compensation for Subsidence—Lease—Deed of Covenant—Owners for Time being—Covenant running with the Land—Non-existent Person—Benefit of Covenant—Heirs and Assigns of Covenantee—Covenantee not a Party—Real Property Act*, 1845 (8 *&* 9 *Vict. c.* 106), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 58, *sub-s.* 1.

By a lease of January, 1887, the owners of minerals, but not of the surface, demised the coal under a large area to C. for thirty years, and C. covenanted with the lessors, "and as separate covenants with other the owners or owner, occupiers or occupier for the time being of the said lands . . . . to pay to the said lessors and other the covenantees or the covenantee compensation for all or any damage" occasioned by the working of the coal demised. C. died in September, 1887, and in October, 1896, the lease was assigned to a colliery company, who worked the coal till 1906, when a serious subsidence took place. The devisees and trustees of a surface owner, who was living at the date of the lease, and other surface owners, who had acquired their title since that date, brought actions against the colliery company, who were in liquidation, and the trustees and executors of C.'s will, claiming damages for subsidence by virtue of the covenant:—

Held, that the covenant was one "respecting any tenements or hereditaments" within s. 5 of the Real Property Act, 1845, the benefit of which, so far as it necessarily affected the value of the land, ran with the land, though the owners of the surface were not parties to the lease; that the covenant with the "owners for the time being" included owners in existence at the date of the lease, with whose "heirs and assigns" it must be deemed, as it related to land, to have been made, by virtue of the Conveyancing and Law of Property Act, 1881, s. 58, sub-s. 1, and consequently that it enured for the benefit of the then owners' heirs and assigns, and therefore for the benefit of all the plaintiffs, who were entitled to sue C.'s trustees and executors for damages.

Kelsey v. *Dodd*, (1881) 52 L. J. (Ch.) 34, discussed and distinguished. FORSTER *v.* ELVET COLLIERY COMPANY, LD.; QUIN *v.* THE SAME: SEED *v.* THE SAME; MORGAN v. THE SAME **C. A. 629**

MISDESCRIPTION—Solicitor—Bill of costs—Bills improperly headed—Sufficiency of bill - - - - - - - **590**
See SOLICITOR. 1.

MONEY HAD AND RECEIVED—Action for—Cheque—Countermand by telegram—Notice - - - - - - - **293**
See BANKER. 1.

MORTGAGE—*Trade Fixtures—Hire and Purchase Agreement—Right of Mortgagee against Owner of Fixtures—Mortgagor in Possession.*

In the absence of express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises provided they are removed before the mortgagee takes possession, but this right of removal ceases when possession is taken by the mortgagee.

In November, 1902, a freehold laundry was mortgaged in the usual form for 400*l.*, the mortgagor covenanting not to remove any fixtures without the written consent of the mortgagee. In June, 1903, trade machinery was fixed up in the premises under a hire and purchase agreement, which provided that it should not become the property of the hirer until all instalments had been paid, and should be removable by the owner on the failure of the hirer to pay any instalment. Default having been made in payment of an instalment, the owner entered and removed the machinery. In an action by the mortgagee against the owner of the machinery for wrongful removal:—

Held (reversing the decision of Phillimore J.), that the machinery passed to the mortgagee as part of the freehold.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, examined and distinguished. ELLIS *v.* GLOVER & HOBSON, LD. - - - - **C. A. 388**

—— Stamp duty—Security for money or stock without limit - - - - - **865**
See REVENUE. 5.

MOTOR CAR—Extraordinary traffic—Summary proceedings - - - - - - **958**
See HIGHWAY. 2.

MOTOR CAR (HEAVY) ORDER, 1904, arts. 2, 3 - - - - - - - **958**
See HIGHWAY. 2.

NEGLIGENCE—*Infringement of Public Right—Special and particular Damage—Negligent Navigation—Damage to Dock—Right of Public to enter Dock—Closing of Dock for Repairs—Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33—*Alexandra (Newport and South Wales) Docks and Railway Act*, 1882 (45 *&* 46 *Vict. c. ccli.*).

By careless navigation the defendants damaged the gates of a certain dock owned by a dock company, so that it was found necessary to close the dock for several days for repairs.

The dock company's special Act incorporated s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, which provides that upon payment of the rates made payable by that and the special Act the dock shall be open to all persons for the shipping and unshipping of goods.

The plaintiffs' ship arrived outside the dock

NEGLIGENCE—*continued.*
in order to take a cargo which was in the dock ready for her to load. Owing to the dock being closed she was detained outside the dock gates for two days and a half. The plaintiffs claimed from the defendants damages for this detention:—
Held, that the negligent act of the defendants was too indirectly related to the plaintiffs' loss to constitute a good cause of action, and that the defendants were entitled to judgment.
Ricket v. *Directors, &c., of the Metropolitan Ry. Co.*, (1867) L. R. 2 H. L. 175, considered.
ANGLO-ALGERIAN STEAMSHIP COMPANY, LD. *v.* HOULDER LINE, LD. - - **Walton J. 659**

NEW TRIAL—County court—Practice.
See under COUNTY COURT.

NONSUIT—Costs—Limits of judge's discretion as to—Practice - - - - - **24**
See COUNTY COURT. 2.

NOTICE—Bankruptcy—Receiving order—Bill of exchange—Conditional payment—Dishonoured bill—Bill outstanding in third party - - - - - - - **344**
See BANKRUPTCY. 1.

—— Cheque — Countermand by telegram — Notice — Action for money had and received—Bills of exchange - - **293**
See BANKER. 1.

—— Drain or sewer—"Intimation" notice—Recovery of expenses of abating nuisance - - - - - - **563**
See LONDON. 1.

NUISANCE—Drain or sewer — "Intimation" notice—Recovery of expenses of abating nuisance - - - - - - **563**
See LONDON. 1.

—— Highway, Obstruction of — Indictable nuisance—What amounts to - **554**
See HIGHWAY. 5.

OBSTRUCTION — Highway, Obstruction of — Indictable nuisance—What amounts to **554**
See HIGHWAY. 5.

OFFICIAL RECEIVER.
See under RECEIVER.

ORIGINATING SUMMONS—Appeal from chambers—"Practice and procedure" - **998**
See PRACTICE. 4.

PAROCHIAL ASSESSMENTS.
See under RATES.

PARTNERSHIP—Foreign judgment—Jurisdiction of foreign Court — Contract of partnership abroad—Partner resident in England - - - - - - **302**
See FOREIGN JUDGMENT.

PENALTY—Waterworks—Water—Insufficiency of supply - - - - - - **917**
See WATERWORKS. 2.

PLANS—Highway — Diversion — Sufficiency of plan - - - - - - - **374**
See HIGHWAY. 1.

—— Malicious refusal of local authority to approve plans—Action - - **170**
See LOCAL GOVERNMENT. 3.

PLEADING—Indictment—Sufficiency of averments - - - - - - - **617**
See CRIMINAL LAW.

PLEDGE—"Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade - - - - - - - **221**
See FACTOR.

POLICY—Life insurance.
See under INSURANCE, FIRE; INSURANCE, LIFE; and INSURANCE, MARINE.

PONTOONS—Rates—"Land covered with water" — Pontoons floating over excavated ground - - - - - - **948**
See RATES. 4.

POOR LAW—Audit of accounts — Auditor — Powers and duties—Surcharge—Certiorari to quash—London government
See LOCAL GOVERNMENT. 1. **407**

POOR RATE.
See under RATES.

POSSESSION—Lease—Death of lessee—Administrator ad colligenda bona—Power to sell—Entry into possession—Rent—Liability de bonis propriis - - **151**
See ADMINISTRATION.

PRACTICE—*Action "for Debt or liquidated Demand in Money"—Claim for Instalment of Contract Price of Ship — Rules of Supreme Court, Order XIV., r. 1; Order III., r. 6.*

The operation of Order III., r. 6 (A), and Order XIV., r. 1, is not confined to cases in which the old action of debt would have been maintainable.

By a contract between the plaintiffs and the defendants for the construction of a steamer by the former the price of the steamer was to be 89,800*l.*, to be paid by the defendants by five instalments, which were respectively to become due at different stages of the construction of the vessel. By the terms of the contract the hull and materials of the vessel were, upon payment of the first instalment, to become the absolute property of the purchasers, subject only to the builders' lien for any unpaid purchase-money; and, in the event of any instalment of the purchase-money remaining unpaid for fourteen days after the same was due, the builders were to be entitled to interest thereon at 5*l.* per cent. per annum until payment, and, in the event of such default, they were to be at liberty to suspend the work, and the time of suspension was to be added to the contract time, or they might complete the vessel at any time after the expiry of fourteen days' notice given to the purchasers, and might sell her after completion, and any loss on such vessel was to fall upon the purchasers, and any balance of the proceeds of such sale which might remain, after satisfying all lawful claims of the builders, was to be paid by the builders to the purchasers.

The first instalment of the purchase-money having by the terms of the contract become due, and remaining unpaid, the plaintiffs brought an action for the same, and applied for leave to sign

PRACTICE—*continued.*

judgment for the amount so claimed under Order XIV., r. 1 :—

Held, that the case came within the provisions of Order XIV., r. 1, and therefore the leave so applied for might be granted. WORKMAN, CLARK & Co. *v.* LLOYD BRAZILEÑO - **C. A. 968**

2. —— *Appeal — "Criminal Cause or Matter"—Distress—Bailiff—Costs and Charges —Agreement for Extra Remuneration—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93)—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47.

The Court of Appeal has no jurisdiction to hear an appeal from a decision of a Divisional Court upon a case stated by justices as to a complaint under s. 2 of the Distress (Costs) Act, 1817, against a certificated bailiff for unlawfully retaining certain charges exceeding those allowed by statute when employed to make a distress for rent for a sum not exceeding 20*l.*, the proceeding before justices being a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873.

Decision of a Divisional Court, [1907] 1 K. B. 690, affirmed. ROBSON *v.* BIGGAR **C. A. 672**

3. —— *Appeal — Matter of "Practice and Procedure" — Arbitration — Application to enforce Award in the same Manner as a Judgment—Supreme Court of Judicature (Procedure) Act*, 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4—*Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 1, 12, 27.

An appeal from an order of a judge at chambers upon an application to enforce an award on a submission to arbitration under the Arbitration Act, 1889, is an appeal in a matter of "practice and procedure" within the meaning of the Judicature (Procedure) Act, 1894, s. 1, sub-s. 4. *In re* COLMAN AND WATSON **C. A. 47**

4. —— *Appeal from Chambers—"Practice and Procedure"—Originating Summons—Order directing Defendant, a Solicitor, to pay Sum of Money to Plaintiff—Supreme Court of Judicature (Procedure) Act*, 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An appeal will not lie direct to the Court of Appeal against an order of a judge at chambers made upon an originating summons and directing the defendant, a solicitor, to pay to the plaintiff a sum of money specified in the summons, the matter not being one of practice and procedure within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4.

Such an order is a final, and not an interlocutory, order. *In re* MARCHANT - **C. A. 998**

5. —— *Discovery—Ship's Papers—Fire Insurance—Rules of Supreme Court, Order XXXI., r.* 12.

The practice with regard to discovery of ship's papers is peculiar to cases of marine insurance, and cannot be extended so as to allow the making of analogous orders for discovery in other cases of insurance. TANNENBAUM & Co. *v.* HEATH - - **C. A. 1032**

PRACTICE—*continued.*

6. —— *Frivolous and Vexatious Action—Dismissal — Cause of Action — Gambling Debt — Forbearance to Sue—New Consideration.*

To an action commenced by a bookmaker by specially indorsed writ for a sum alleged to be due on a stated account, the defendant pleaded in his defence that the debts were gambling debts, and this was admitted by the plaintiff by his answer to interrogatories, but the plaintiff stated by his answer, as other considerations for the defendant's indebtedness, the plaintiff's forbearance to sue and his giving time to the defendant at the latter's request. The defendant applied to have the action dismissed as being frivolous and vexatious :—

Held, that the forbearance to sue at the defendant's request, in view of the possible apprehension of the defendant of the consequences of not paying the gambling debt, which it would be competent to the plaintiff, consistently with the pleadings, to allege and prove, might constitute a new and valid consideration for the debt, and that the action ought not to be summarily dismissed. GOODSON *v.* GRIERSON **C. A. 761**

7. —— *New Trial—Notice of Motion—Time —Action tried with Jury—Rules of the Supreme Court, Order XXXIX., r.* 4.

Upon the trial of an action with a jury, the jury answered the questions of fact left to them by the judge, and were discharged. The judge then referred the question of the amount due to the plaintiff upon those findings to a special referee for report. Upon further consideration, after receiving the referee's report, the judge gave judgment for the plaintiff for a certain amount. Four days after the judgment, but a year after the verdict, the defendants gave notice of motion to the Court of Appeal for (inter alia) a new trial :—

Held, that the date to be regarded for the purpose of giving notice of motion for a new trial under Order XXXIX., r. 4, was the date of the findings of the jury, and not that of the judgment on further consideration, and that therefore the notice of motion, so far as it asked for a new trial, was out of time. GREENE *v.* CROOME - - - - - **C. A. 277**

—— Action.
See under ACTION.

—— County court.
See under COUNTY COURT.

—— Pleading — Indictment — Sufficiency of averments - - - - - **617**
See CRIMINAL LAW.

—— Staying proceedings where submission to arbitration—Jurisdiction - - **403**
See COUNTY COURT. 2.

PREMIUMS—Life insurance.
See under INSURANCE, LIFE.

PRESCRIPTION—Light — Dominant and servient tenements united in one freeholder—Extinguishment of easement
See LIGHT. **39**

PRESUMPTION—Manorial market—Extent of franchise—New streets—Dedication
See MARKET. 115

PRINCIPAL AND AGENT—Fraud of insurance agent—Avoidance of policy—Recovery back of premiums - - - 545
See INSURANCE, LIFE.

PRINCIPAL AND SURETY—Corporation—Dissolution—Bona vacantia—Chattels real—Limited company lessees—Sureties for payment of rent during the term - 378
See CORPORATION.

PRIVILEGE — Libel — Report of official receiver under Companies (Winding-up) Act, 1890 - - - - - - 584
See DEFAMATION.

PROMISSORY NOTE—Stamp—Payable at sight—Ad valorem duty - - - 582
See REVENUE. 4.

PROOF—Sham sale by debtor—Part payment of purchase-money—Right of proof - 941
See BANKRUPTCY. 4.

PUBLIC HEALTH — Auditor — Powers and duties—Surcharge—Certiorari to quash—Jurisdiction of Court - - 407
See LOCAL GOVERNMENT. 1.

—— Compensation—Damage caused by exercise of statutory powers - - - 327
See COMPENSATION.

—— Drains.
See under SEWERS.

—— Rates — "Land covered with water"—Pontoons floating over excavated ground - - - - - 948
See RATES. 4.

—— Sewers.
See under SEWERS.

PUBLIC-HOUSE — Receiver — Licences in jeopardy—Landlord and tenant—Recovery of possession - - - - 79
See RECEIVER

PUBLIC POLICY—Contract—Breach of promise of marriage—Married man - 720, 729
See MARRIAGE. 1, 2.

RAILWAY—*Bridge—Approaches—Public Carriage Road carried over Railway—Width of Bridge—Liability of Railway Company—Special Act—Construction—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 50, 51.

By the Taff Vale Railway Act, 1836, s. 69, it was in substance provided that, where a bridge should be erected by the railway company for carrying a public highway over the railway, it should be formed and continued of a width of not less than fifteen feet.

By the Railways Clauses Consolidation Act, 1845, s. 50, so far as material, "every bridge erected for carrying" a public carriage road "over the railway shall, except as otherwise provided by the special Act," be of the width of twenty-five feet; but by s. 51 it is provided that, "where the average available width for the passage of carriages of any existing roads within

RAILWAY—*continued.*

fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet; provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of any such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such an extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width therein or in the special Act prescribed for a bridge in the like case over or under the railway."

By the Taff Vale Railway Act, 1846, the provisions of the Taff Vale Railway Act, 1836, were incorporated, except such of them as were inconsistent with those of (among other Acts) the Railways Clauses Consolidation Act, 1845:—

Held, that the provisions of the Taff Vale Railway Act, 1836, s. 69, were not inconsistent with those of the Railways Clauses Consolidation Act, 1845, and therefore the obligations of the railway company as regards a bridge coming within the terms of that section, which was erected under the powers given by the Taff Vale Railway Act, 1846, were governed, not by the Railways Clauses Consolidation Act, 1845, s. 50, but by their special Act.

Semble, that the liability imposed on railway companies by s. 51 of the Railways Clauses Consolidation Act, 1845, to widen "bridges" carrying roads over railways where the width of the road has been increased "beyond the width of such bridge on either side thereof" does not extend to the approaches to the bridge.

Appeal from the judgment of Phillimore J., [1907] 1 K. B. 739. Appeal dismissed, and cross-appeal allowed. RHONDDA URBAN DISTRICT COUNCIL *v.* TAFF VALE RAILWAY COMPANY - - - - - - C. A. 239

2. —— *Carrier—Just and reasonable Condition—Carriage of Dogs—Declaration of Value—Extra Charge in respect of Dogs worth more than 2l.—Percentage on Excess Value—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

A contract signed by a person delivering a dog for carriage to a railway company stated that the company would not be common carriers of dogs, nor would they receive dogs for carriage except on the condition that they should not be responsible beyond the sum of 2*l.*, unless a higher value was declared at the time of delivery to the company and a percentage of 1½ per cent. paid upon the excess of the value so declared:—

Held, that the above-mentioned condition was just and reasonable within the meaning of the Railway and Canal Traffic Act, 1854, s. 7, and, there having been no declaration of value, protected the railway company from liability beyond the amount of 2*l.* in respect of the loss, through

RAILWAY—*continued.*

the negligence of their servants, of the dog delivered to them for carriage. WILLIAMS *v.* MIDLAND RAILWAY COMPANY - **C. A. 252**

3. —— *Regulation — Increase of Rates — Reasonableness—Evidence—Railway and Canal Traffic Act*, 1894 (57 *&* 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, it is enacted that where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

The question whether an increase in a rate is reasonable depends upon the circumstances existing at the time the increase was made, including the charges before and after the increase with reference to the services rendered and to be rendered, the expenses of performance, and every other fact with relation thereto.

The Act of 1894 does not confer any general jurisdiction upon the Court of the Railway and Canal Commission to investigate the reasonableness of rates. NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY, LONDON AND NORTH WESTERN RAILWAY COMPANY, GREAT WESTERN RAILWAY COMPANY, AND SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY - **Railway and Canal Commission 771**

—— Compensation—Limestone required to be left unworked - - - - **925**
See MINES. 1.

—— Rateable value—Profits—Mode of ascertaining—Evidence—Admissibility **750**
See RATES. 3.

—— Ship—Dock rates—West India Dock—Exemption from dock rates—Lighter
See SHIPPING. 6. **786**

RATES—*Burial Ground separated from Church—Churchyard—Liability to Poor Rate—Profit derived from Burial Ground—Exemption from Poor Rate—Premises "exclusively appropriated to Public Religious Worship"—Poor Rate Exemption Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 30).

The churchyard of a parish church having been closed by virtue of an order made under the Acts relating to overcrowded burial grounds, two pieces of land contiguous to each other, but at a distance of 300 yards from the church, were acquired by the Ecclesiastical Commissioners or their predecessors under the Church Building Acts, and were consecrated for interment according to the rites of the Church of England, and thereafter constituted the burial ground used in connection with the church. There was a fixed fee for the performance of burials, and charges were made for the purchase of so-called "freehold graves" in the burial ground, for the reopening of graves, for taking down and fixing memorials, and for other matters connected with interments; and the net income derived therefrom was received by the rector of the parish and retained by him for his own use. There were no buildings in the burial ground for the

RATES—*continued.*

purpose of conducting religious services in connection with burials:—

Held (reversing the decision of a Divisional Court, [1907] 1 K. B. 27), that there was a rateable occupation by the rector of the burial ground, and that it was not exempt from rateability by virtue of the Poor Rate Exemption Act, 1883. NORTH MANCHESTER OVERSEERS *v.* WINSTANLEY - - - - **C. A. 835**

2. —— *Licensed Premises — Compensation Charge—Poor Rate—Rateable Value—Deduction—Expense necessary to command Rent—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Parochial Assessments Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 1.

In estimating the rateable value of fully-licensed premises the amount of the annual charge imposed in respect of the premises under s. 3 of the Licensing Act, 1904, cannot be deducted, the charge not being an expense necessary to maintain the premises in a state to command the rent thereof within s. 1 of the Parochial Assessments Act, 1836:—

So *held* (affirming judgment of Divisional Court, [1906] 2 K. B. 899). WADDLE *v.* SUNDERLAND UNION - - - **C. A. 642**

3. —— *Railway—Profits—Mode of ascertaining—Evidence—Admissibility—Profits attributable to the Occupation of Portions of the Railway outside the Parish—Rating—Rateable Value.*

In proceedings for the rating of a section of railway situate in parish A, the railway company tendered evidence that part of the profits of the line in that parish was attributable, not to their occupation of the line in that parish, but to their occupation of the line in parish B, and that in the assessment of their line in parish B it had been held that profits made outside the parish, including profits made in parish A, were attributable to their occupation of the line in parish B, and the rateable value of the line in the latter parish was increased accordingly:—

Held, that the overseers were bound to admit this evidence, and that, in assessing the rateable value of the line in parish A, some deduction ought to be made in respect of any excess sum which the railway company had been held liable to pay for the occupation of their line in parish B by reason of its earning profits in parish A. GREAT CENTRAL RAILWAY COMPANY *v.* SHEFFIELD UNION - - - - **C. A. 750**

4. —— *Water — General District Rate — Occupation of Land — "Land covered with Water" — Pontoons floating over excavated Ground—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

The appellants, a dock company, were the owners and occupiers of certain hereditaments on the north-west bank of the river Tyne. Part of the hereditaments consisted of a yard with buildings used for building and repairing ships. The appellants excavated a certain space of ground alongside of their yard which before the excavation was dry land belonging to them. After the excavation the water of the Tyne flowed at all states of the tide over the excavated

RATES—*continued.*

ground. The appellants constructed two pontoons, which were used by them in their business of repairing ships. The most important part of the appellants' business was done by means of the pontoons. The pontoons floated over the excavated ground, each pontoon being kept in position by iron arms or booms working up and down on hinges as the tide rose or fell. The arms were arranged in pairs one above another, and were attached at one end to the pontoon and at the other to piles driven into the excavated ground; but the pontoons could be detached from the piles, and might have been kept in position by means of chains instead of the iron arms:—

Held (affirming the decision of a Divisional Court, [1908] 1 K. B. 315)—(1.) that the appellants were in occupation of the excavated land so as to be rateable in respect of it, inasmuch as they were in occupation of the land before and during the excavation, and afterwards the most important part of their business was done over the site; (2.) that the excavated ground over which the pontoons floated was "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. SMITH'S DOCK COMPANY, LD. *v.* TYNEMOUTH CORPORATION - - - - - **C. A. 948**

NOTE.—The terms "appellants" and "respondents" are used throughout this report with reference to the relation of the parties at quarter sessions.

—— Flats — Poor rate — Valuation — Rateable value—Deductions from gross value **811**
See LONDON. 2.

REAL PROPERTY ACT—Mine — Covenant — Compensation for subsidence - **629**
See MINES. 2.

RECEIVER—*Public-house—Licences in Jeopardy—Landlord and Tenant—Recovery of Possession—Receiver of Licences and of Rents and Profits—Preservation of Subject-matter of Litigation—Practice—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of the Supreme Court*, 1883, *Order* L., *rr.* 3, 16—*Form of Order.*

The owner of licensed premises has sufficient prima facie interest in the business to entitle him to the appointment of a receiver of the licence to secure its preservation pending litigation.

In an action by a lessor to recover possession of an hotel, where the lessee had covenanted to keep the hotel continuously open and not to do anything whereby the licence might be endangered, the Court appointed a receiver of the licence and of the rents and profits, ordered the licence to be delivered up to the receiver, and authorized him to keep the house continuously open as an hotel, and to do all such acts as might be necessary for that purpose, and for the purpose of preserving the licence from forfeiture.

Form of order in *Charrington & Co., Ld.* v. *Camp*, [1902] 1 Ch. 386, discussed and modified. LENEY & SONS, LD. *v.* CALLINGHAM AND THOMPSON - - - - - **C. A. 79**

RECEIVER—*continued.*

—— Libel — Absolute privilege — Report of official receiver under Companies (Winding-up) Act, 1890 - - **584**
See DEFAMATION.

RECEIVING ORDER — Bankruptcy notice — Bill of exchange — Conditional payment — Dishonoured bill — Bill outstanding in third party - - **344**
See BANKRUPTCY. 1.

REGISTRATION — Bill of sale — Validity — Defeasance - - - - - **744**
See BILL OF SALE. 2.

—— Company—Debenture of foreign company —Bill of sale—Non-registration **667**
See COMPANY.

REMITTAL—Action to county court—Action of tort - - - - - - - **1002**
See COUNTY COURT. 4.

REMOTENESS—Damages—Intervening criminal act of third party causing loss - **280**
See CONTRACT.

REMUNERATION.
See under COSTS.

RENEWAL—Licence.
See under LICENSING ACT.

RENT—Lease—Death of lessee—Administrator ad colligenda bona — Power to sell—Entry into possession—Liability de bonis propriis - - - - **151**
See ADMINISTRATION.

REPAIR—Highway.
See under HIGHWAY.

RESERVOIR—Land compulsorily taken—Compulsorily taken — Compensation — Special value — Obtainable by compulsory powers - - - - **571**
See WATERWORKS.

REVENUE—*Estate duty—Foreign Bonds payable to Bearer—Bonds situate in United Kingdom—Marketable Securities—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 2.

Foreign Government and railway bonds payable to bearer and marketable on the Stock Exchange, when physically situate in the United Kingdom at the death of the testator, are liable to estate duty even though the deceased was not a domiciled Englishman.

Attorney-General v. *Glendining*, (1904) 92 L. T. 87, affirmed.

Attorney-General v. *Bouwens*, (1838) 4 M. & W. 171, followed and applied.

WINANS *v.* THE KING - - **C. A. 1022**

2. —— *Income Tax — Exemption — Existing Tax—Thames Conservancy Act*, 1894 (57 *&* 58 *Vict. c. clxxxvii.*), *s.* 289.

Sect. 289 of the Thames Conservancy Act, 1894, provides that, "notwithstanding anything in any Act," the properties therein mentioned shall be exempt from all parliamentary rates, taxes, and payments whatsoever.

The respondents, the conservators of the river Thames, claimed exemption under this section from the payment of income tax for the years

REVENUE—*continued.*

1905 and 1906 in respect of properties within the section.

The surveyor of taxes contended that, income tax being an annual tax, the income tax for the years 1905 and 1906 was not a tax existing at the date of the passing of the Thames Conservancy Act, 1894, and that the respondents were, therefore, not entitled to the exemption claimed :—

Held that, though income tax is in form an annual tax, the income tax payable in the years subsequent to 1894 must, for the purpose of the exemption, be deemed to be a tax which was existing at the date of the passing of the Thames Conservancy Act, 1894, and that the respondents were, therefore, entitled to the exemption claimed. STEWART *v.* THAMES CONSERVATORS **Bray J. 893**

3. —— *Male Servants — Waiter — Cook — Steward — Persons employed as in Trading Establishment—Customs and Inland Revenue Act*, 1869 (32 *&* 33 *Vict. c.* 14), *s.* 19.

The Customs and Inland Revenue Act, 1869, which imposes a tax upon male servants, is prima facie intended to apply only to servants employed in private establishments, and not to servants employed for purposes of trade, even though they may be employed in any of the capacities enumerated in the Act as being included in the expression "male servant." WHITELEY *v.* BURNS - - **Div. Ct. 705**

4. —— *Stamp—Promissory Note—Payable at Sight—Ad Valorem Duty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 32, 33 ; *Sched. I.*

A promissory note payable at sight is liable to an ad valorem stamp duty. OETTINGER *v.* COHN - - - - - - **Channell J. 582**

5. —— *Stamp Duty—"Security for Money or Stock without Limit"—Expression of Opinion by Commissioners as to Duty chargeable—Mortgage —Trust Deed for securing Debenture Stock— Principal or primary Security — Security auxiliary or by way of further Assurance— Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 12, *sub-s.* 6 (*b*) ; *s.* 88 ; *First Schedule*, "*Mortgage*," *&c.* (2.)—*Revenue Act*, 1903 (3 *Edw.* 7, *c.* 46), *s.* 7.

By an indenture dated May 28, 1897, certain freehold and leasehold hereditaments were, by direction of a brewery company, respectively conveyed and demised to trustees. The indenture contained a covenant to surrender to the use of the trustees certain copyholds, and an assignment to them of a goodwill and other matters. By the indenture it was agreed that the trustees should stand possessed of the hereditaments and premises upon the trusts contained in an indenture dated May 20, 1897.

The indenture of May 20, 1897, after reciting (inter alia) that the company had determined to issue certain debenture stock, to be constituted and secured as therein provided, contained a covenant by the company with the trustees that the company would cause the hereditaments to be forthwith conveyed to and vested in the trustees for securing the payment by the company of the debenture stock and the dividends thereon, with a provision for reconveyance to

REVENUE—*continued.*

the company upon proof that all the stockholders had been paid off or satisfied and upon payment of all costs incurred by the trustees in relation to the indenture. The indenture also created a floating charge upon all the property and assets for the time being of the company. In addition to other provisions for the maintenance and enforcement of the security thereby created, the indenture contained (clause 33) a provision that if default should be made in keeping the mortgaged premises in a good state of repair and working condition, and so insured as in the indenture specified, the trustees might from time to time repair or renew, or insure (as the case might require), the mortgaged premises or any part thereof, and the company would on demand repay to the trustees every sum of money expended by them for the above purposes, with interest at the rate of 5 per cent. per annum from the time of the same having been expended, and until such repayment the same should be a charge upon the mortgaged premises.

The indenture was stamped with 2*s.* 6*d.* per cent. upon 230,000*l.*, the amount to which the stock was limited, and 23,000*l.*, the premium at which the stock was redeemable at the company's option.

Debenture stock to the amount of 223,000*l.* was subsequently issued by the company upon the security of the indentures :—

Held, that clause 33 of the indenture of May 20, 1897, although one of the provisions referred to in the indenture of May 28, 1897, subject to which the trustees were to stand possessed of the hereditaments, did not make the latter indenture a security for money or stock without limit within the meaning of s. 12, sub-s. 6 (*b*), of the Stamp Act, 1891, and that therefore the Commissioners of Inland Revenue were bound to adjudicate the liability of the indenture to duty.

Held, further, that the indenture of May 20, 1897, was the primary security, and the indenture of May 28, 1897, a mortgage by way of further assurance, within the meaning of the head of the First Schedule to the Stamp Act, 1891— "Mortgage, Bond, Debenture, Covenant," subhead (2.)—and that therefore, in addition to the duty to which the indenture of May 28, 1897, was liable as a conveyance on sale, duty at the rate of 6*d.* per cent. upon 223,200*l.*, the amount of the debenture stock issued, was payable upon it.

Sect. 88 of the Stamp Act, 1891, contemplates that a primary security may be a deed on which, at the time it is executed, there has been no money lent or advanced.

Sect. 7 of the Revenue Act, 1903, is not retrospective, and the duty which is payable on a deed is that which was payable at the date of its execution. LORD SUFFIELD *v.* INLAND REVENUE COMMISSIONERS - - **Bray J. 865**

RULES OF SUPREME COURT :—Order III., r. 6 —*Indorsement of Claim* - - **968**
See PRACTICE. 1.

—— **Order XIV., r. 1**—*Leave to Sign Judgment and Defend where writ Specially Indorsed* - - - - - **968**
See PRACTICE. 1.

RULES OF SUPREME COURT—*continued.*

—— **Order XXXI., r. 12**—*Discovery and Inspection* - - - - - - **1032**
See PRACTICE. 5.

—— **Order XXXIX., r. 4**—*Motion for New Trial*
See PRACTICE. 1. **277**

—— **Order L., rr. 3, 16**—*Interlocutory Orders as to Injunctions, &c.* - - - **79**
See RECEIVER.

SALE—Bankruptcy—Sham sale by debtor—Part payment of purchase-money—Right of proof - - - - - - - **941**
See BANKRUPTCY. 4.

SALE OF GOODS—*Contract for Sale of Cattle at Price including Cost, Freight, and Insurance—Contract by Seller to insure Cattle "against all Risks" — Warranty in Policy against "Capture, Seizure and Detention"—Slaughter of Cattle in consequence of Government Prohibition against Landing—Liability of Seller.*

Cattle were bought at Buenos Ayres, at a price including cost, freight, and insurance, for shipment to Durban; by the contract of sale the seller was to insure the cattle "against all risks." The seller obtained, and handed to the buyer, a policy of insurance which was an ordinary "all risks" Lloyd's policy, but which, in accordance with the usual practice among insurance brokers and underwriters with regard to such policies, contained a warranty against "capture, seizure and detention, and the consequences thereof." Disease broke out among the cattle on the voyage, and on arrival at Durban the authorities forbade their landing, and the cattle were consequently slaughtered. The underwriters having refused to pay upon the policy, except in regard to risks not affected by the warranty, the buyer brought an action against the seller to recover damages for breach of contract to insure the cattle "against all risks":—

Held, that the contract was not satisfied by the procuring of a policy which did not protect the buyer from loss arising in consequence of the cattle not being allowed to land, and that the seller was, therefore, liable to the buyer in damages for breach of contract.

Decision of Channell J., [1907] 1 K. B. 685, affirmed. YUILL & CO. *v.* SCOTT ROBSON **C. A. 270**

SALESMAN—Trade mark—Proprietor—Salesman on commission—Natural product
See TRADE MARK. **712**

SCHOOLS—*Assistant Master—Scheme—Master and Servant—Wrongful Dismissal—Notice of Dismissal—Power to dismiss "at pleasure"—Action against Governors—Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *s.* 22.

A scheme made under the Endowed Schools Act, 1869, with regard to an endowed school, provided that the foundation should be administered by a body of governors, who should appoint the head master of the school, and that the head master should have the sole power of appointing, and might "at pleasure" dismiss, all assistant masters in the school. In an action for wrongful

SCHOOLS—*continued.*

dismissal by a plaintiff who had been an assistant master in the school against the governors in respect of his dismissal by the head master without notice, the jury found that a custom existed entitling assistant masters in endowed schools to a term's notice of dismissal:—

Held (affirming the judgment of Lawrance J.), that such a custom as above mentioned was excluded by the terms of the scheme, and therefore the plaintiff was not entitled to notice of dismissal, and that in any case the action was not maintainable against the governors. WRIGHT *v.* MARQUIS OF ZETLAND - - **C. A. 63**

2. —— *Schools (Education)—Public Elementary School — Non-provided School — Duty of Local Education Authority — Maintain and keep Efficient—Direction limiting secular Instruction to Infants — Decision of Board of Education—Jurisdiction of Court—Injunction—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-ss.* 1 (*a*), 3; *s.* 16.

A non-provided school had been carried on before and after the coming into force of the Education Act, 1902, as a public elementary school for the education of children of both sexes in all standards from 1 to 7. The local education authority issued a direction to the managers of the school that after a certain date no secular instruction was to be given in the school except to children in standards 1 to 3. The managers of the school refused to comply with the direction, and brought an action for an injunction to restrain the local education authority from obstructing or interfering with them in the discharge of their duties as managers of a fully recognized public elementary school:—

Held, that the direction was not a direction as to secular instruction within s. 7, sub-s. 1 (*a*), of the Education Act, 1902, and was ultra vires, being in breach of the obligation imposed on the local education authority by s. 7, sub-s. 1, to maintain and keep the school efficient; that the question as to the right of the authority to enforce the direction was not a question arising under s. 7 which had to be determined by the Board of Education under sub-s. 3 of s. 7 or s. 16; that the Court had jurisdiction to entertain the action; and that the managers were entitled to an injunction restraining the local education authority from enforcing the direction. WILFORD *v.* WEST RIDING OF YORKSHIRE COUNTY COUNCIL - - - **Channell J. 685**

—— Assault—Schoolmaster—Corporal punishment—School regulations - - **947**
See ASSAULT.

SCHOOLMASTER.
See under SCHOOLS.

SERVANT—Male servants—Persons employed in trading establishment - - **705**
See REVENUE. 3.

—— Master and servant.
See under EMPLOYER AND WORKMAN.

SET-OFF—Bankruptcy—Mutual dealings - **195**
See BILL OF SALE. 1.

SET-OFF—*continued.*

—— Gift of money by bankrupt to wife—Gift void as voluntary settlement—Debt due from bankrupt to wife—Right of wife to set-off - - - - - **174**
See BANKRUPTCY. 3.

SETTLEMENT—Voluntary—Gift of money by bankrupt to wife—Debt due from bankrupt to wife—Right of wife to set-off **174**
See BANKRUPTCY. 3.

SEWERS—*Adjoining Houses—Single Private Drain—Entry by Local Authority upon Ground of one House—Examination of Drain—Notice to Occupier of Adjoining House — Recovery of apportioned Part of Expenses of relaying Drain —Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41.

The drainage of two adjoining houses was carried into a public sewer by a single private drain. The sanitary inspector of the appellants (the local authority), on the application of the occupier of one of the houses, applied the smoke test to the drains of that house and found that something was wrong. The appellants subsequently served a notice on the respondent, the owner of the adjoining house, requiring him, in conjunction with the owners of the house where the smoke test had been applied, to take up and relay the drain within one month. The work not having been done, the appellants did it and apportioned the costs in respect of the respondent's house at 23*l.* 9*s.* 2*d.* The appellants had given no notice under the first part of s. 41 of the Public Health Act, 1875, to the occupier of the respondent's house of their intention to enter the house where they applied the smoke test and examine the drain, and no evidence of emergency was given. The respondent did not pay the 23*l.* 9*s.* 2*d.*

On a complaint preferred by the appellants against the respondent that the 23*l.* 9*s.* 2*d.* had not been paid :—

Held, that twenty-four hours' notice to the occupier of the respondent's house of the intention of the appellants to enter the house where the smoke test was applied and examine the drain was not a condition precedent to the right of the appellants to recover the apportioned expenses from the respondent, inasmuch as the object of the twenty-four hours' notice required by the first part of s. 41 of the Public Health Act, 1875, is to enable the surveyor to enter when his entry, but for that notice, would be a trespass. The notice is not to enable the owner, who might ultimately be liable, to come and see the result of opening the drain, inasmuch as it is not to the owner it has to be given, but to the occupier. BROMLEY CORPORATION *v.* CHESHIRE - - - - - **Div. Ct. 680**

—— Compensation—Damage caused by exercise of statutory powers—Public health
See COMPENSATION. **327**

—— Drain or sewer—Nuisance—"Intimation" notice—Service on person not liable—Compulsion — Recovery of expense of abating nuisance - - - **563**
See LONDON. 1.

SEWERS—*continued.*

—— Land drainage—Neglect to clean and scour channel—Water mill - - - **485**
See LAND DRAINAGE.

SHERIFF—*Practice—Execution by fieri facias —Money belonging to Judgment Debtor—Death of Judgment Debtor before Seizure by Sheriff—Administration Order under Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125—*Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 12.

After the death of a judgment debtor against whose effects a writ of fieri facias had been sued out, the sheriff has no power under the Judgments Act, 1838, s. 12, to seize by virtue of the writ money which belonged to the judgment debtor in his lifetime.

The goods of a judgment debtor at his house were seized under a fieri facias. While the sheriff was in possession at the house, the judgment debtor, without the knowledge of the sheriff, placed a sum of money which he had received in a drawer in his bedroom there. Some days afterwards he died ; and his widow, having found the money, removed it and deposited it with her solicitors, the sheriff remaining in ignorance of its existence. Subsequently an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of the judgment debtor's estate in bankruptcy. The sheriff, having learned of the existence of the above-mentioned sum of money, claimed it from the solicitors, and, interpleader proceedings having been taken, an order was made for the trial of an issue whether the trustee under the administration order was entitled to the money as against the execution creditor :—

Held (reversing the judgment of Lawrance J., [1907] 2 K. B. 437), that there was no seizure by the sheriff before the death of the judgment debtor ; and that, after his death, the sheriff could not seize the money ; and consequently it belonged to the trustee as against the execution creditor. JOHNSON *v.* PICKERING ; NORTON, CLAIMANT - - - - - **C. A. 1**

SHIPPING — *Average — General Average — Cargo of Coal—Tendency to spontaneous Combustion—"Portions of bulk Cargo" on fire—Water Damage to Cargo in extinguishing—Liability of Ship to contribute in general Average—York-Antwerp Rules*, 1890, *r.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

The fact that a peril occasioning a general average sacrifice of cargo is brought about by the inherent vice of the cargo itself does not preclude the cargo owner from claiming contribution in general average unless his conduct in shipping the goods was wrongful or negligent.

Coal was shipped on board the plaintiffs' ship under bills of lading which provided that average was to be adjusted according to the York-Antwerp Rules, 1890, by rule 3 of which "Damage done to . . . . cargo . . . . by water . . . . in extinguishing a fire on board the ship shall be made good as general average ; except that no compensation shall be made for damage to such portions of the . . . . bulk cargo . . . . as have been on fire." The coal was stowed in four different holds. While the ship was at sea a fire broke out in three out of the four holds owing to

SHIPPING—*continued.*

the spontaneous combustion of the coal. The coal was not exceptionally dangerous, and the fire was in no way attributable to any negligence on the part of the shippers. In order to extinguish the fire water was thrown into the holds, whereby so much of the coal as had not been ignited was damaged. In respect of the damage so done by the water the owners of the coal claimed against the ship contribution in general average :—

Held—(1.) That the fact of the coal's liability to spontaneous combustion having been the cause of the fire which necessitated the damage was no answer to the coal owner's claim ;

(2.) That the words "such portions of the bulk cargo as have been on fire" in the exception in rule 3 of the York-Antwerp Rules did not refer to physical divisions of the cargo by means of bulkheads, so as to constitute the entire contents of each hold one "portion" within the meaning of the rule, but meant so much of the coal on board the ship as had been actually ignited ;

(3.) That s. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship . . . . shall not be liable to make good . . . . any loss or damage happening without his actual fault or privity . . . . where any goods . . . . put on board his ship are lost or damaged by reason of fire on board the ship," had no reference to general average contributions, and afforded no defence to the plaintiffs against the coal owners' claim. GREENSHIELDS, COWIE & CO. *v.* STEPHENS & SONS **C. A. 51**

2. —— *Bill of Lading—Charterparty—Signature of Bill of Lading by Time Charterer on behalf of Shipowner—Construction of Bill of Lading—Port "inaccessible on account of Ice"—"Any other Cause"—"Error in Judgment" of Master.*

Goods were shipped on board a steamship under four bills of lading which contained the following conditions and exceptions : "(2.) Error in judgment, negligence or default of . . . . master . . . . or other persons in the service of the ship, whether in navigating the ship or otherwise" ; "(4.) Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods ; and upon such discharge the ship's responsibility shall cease."

At the time the bills of lading were signed the steamer was under a time charter, which contained the following clause : "(12.) The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements ; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibility as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual."

The time charterers signed one of the bills of lading "For the captain and owners" :—

Held—(1.) that the signature of the time charterers to the bill of lading bound the shipowners ; (2.) that "inaccessible" in the bills of lading did not mean inaccessible at the moment the ship first arrived off the port, but inaccessible within a reasonable time after the ship arrived off the port and endeavoured to get in ; (3.) that the words "error in judgment of the master" in clause 2 of the exceptions and conditions in the bills of lading did not include misconstruction by him of the bills of lading ; (4.) that the words "or other cause" in clause 4 of the exceptions and conditions in the bills of lading must be read as ejusdem generis with war or disturbance, and therefore did not include ice. TILLMANNS & CO. *v.* SS. KNUTSFORD, LD. **Channell J. 185**

3. —— *Bill of Lading—Limitation of Shipowner's Liability—Loss due to Shipowner's Negligence.*

The plaintiffs shipped goods on board the defendants' ship for carriage from London to Buenos Ayres under a bill of lading containing a clause which provided that the defendants should not be accountable to any extent for certain specified goods, which did not include goods of the kind shipped by the plaintiffs, "nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package." The plaintiffs' goods were lost in the course of the voyage through the negligence of the defendants. In an action to recover the full value of the goods :—

Held that, notwithstanding that the loss was due to the defendants' negligence, they were only liable to the limited extent provided by the bill of lading. BAXTER'S LEATHER COMPANY *v.* ROYAL MAIL STEAM PACKET COMPANY **Bigham J. 796**

4. —— *Charterparty — Demurrage — Lay Days—Arrival at Place of Loading.*

When the place named in a charterparty as the place of loading is a port or other wide district (as distinguished from the case in which the charterparty either names a definite spot in the port or dock as the place of arrival, or gives the charterer in express terms the right to order a vessel to a definite and precise loading spot), the lay days begin when the ship is ready and at the freighter's disposal within the named place in its commercial sense, though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go.

By a charterparty it was agreed that the plaintiffs' steamship should "proceed as ordered

by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . viz., (4.) at one or two safe loading ports or places in the river Paraná, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship . . . . time for loading shall commence to count twelve hours after written notice has been given by the master . . . . that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers."

The vessel was ordered to Bahia Blanca. She arrived off the pier at Bahia Blanca, and anchored in the river within the port a few ship's lengths off the pier. The master then gave notice that the ship was ready to load. The charterers desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port :—

Held (reversing the judgment of Channell J., [1907] 1 K. B. 344), that the lay days commenced twelve hours after the notice of readiness to load given by the master, and not from the time the vessel obtained the berth alongside the pier.

Nelson v. *Dahl*, (1879) 12 Ch. D. 568, and *Pyman* v. *Dreyfus*, (1889) 24 Q. B. D. 152, explained and followed. LEONIS STEAMSHIP COMPANY, LD. *v.* RANK, LD. - - **C. A. 499**

5. —— *Charterparty—Demurrage—Weather working Days—Surf Days—Custom of Port—Admissibility of Evidence—Time allowed for discharge of Cargo—Delay caused by Surf.*

The expression "weather working day," as used of lay days for loading or discharging a vessel, has a natural and ordinary meaning, namely, a day on which the work of loading or discharging is not prevented by bad weather. Therefore, where by a charterparty the charterers bind themselves to take delivery of the cargo at an average rate per weather working day, evidence of a custom that at the port of discharge the expression bears a different meaning is not admissible.

By a charterparty a vessel was to proceed to one or two safe ports between Valparaiso and Pisagua inclusive, as ordered on arrival at Valparaiso, and there deliver the cargo in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier where she could always safely lie afloat as directed by the consignees.

The exceptions clause included a provision "detention through . . . . delay by . . . . surf . . . . not to count in the time allowed for loading or discharging." The cargo was to be taken delivery of from alongside ship at port of discharge, "at the average rate of not less than 250 tons per weather working day (Sundays and holidays excepted) . . . ."

The vessel was ordered to discharge at Valparaiso :—

Held—(1.) that evidence was not admissible to shew that by the custom of the port of Valparaiso a surf day (i.e., a day on which the surf on the beach is so heavy that lighters cannot land their cargo there without unusual difficulty and delay) does not count as a weather working day, and that surf days were fixed by the decision of the port captain; (2.) that the exception detention through . . . . delay by . . . . surf . . . . not to count in the time allowed for . . . . discharging" was not limited to detention through delay caused by surf in the discharge of the cargo from the ship into lighters, but included detention through delay caused by surf in landing the cargo from the lighters on to the beach. BENNETTS & CO. *v.* BROWN.

Walton J. 490

6. —— *Dock Company — Exemption from Dock Rates—Lighter—"Bona fide engaged in discharging or receiving Goods to or from on Board of a Ship"—West India Dock Act*, 1831 (1 & 2 *Will.* 4, *c. lii.*), *s.* 83.

By a section of a dock company's Act it was provided that "all lighters or craft entering the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates, so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid."

Where a lighter was taken into one of the company's docks with the bona fide intention of discharging goods into a certain vessel then lying in the dock, but, after waiting alongside the vessel to discharge for some time, was unable to do so, in consequence of the vessel's loading being complete, and thereupon went out of the dock with her cargo undischarged :—

Held, that the lighter was, while in the dock, bona fide engaged in discharging goods to a vessel lying in the dock within the meaning of the above-mentioned section, and therefore the exemption thereby conferred applied to her. LONDON AND INDIA DOCKS COMPANY *v.* THAMES STEAM TUG AND LIGHTERAGE COMPANY. - - - - - - **C. A. 786**

7. —— *Tonnage — "Deck Cargo" — Coal carried on Deck for Use on Voyage—"Timber, Stores, or other Goods"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 85.

Coals carried in an uncovered space upon the deck of a ship, though intended for use in the ship's fires upon the voyage, come within the words "stores or other goods," and are carried "as deck cargo," within the meaning of s. 85 of the Merchant Shipping Act, 1894.

Dicta in *Richmond Hill Steamship Co.* v. *Corporation of Trinity House*, [1896] 2 Q. B. 134, not followed.

Judgment of Bray J., [1907] 1 K. B. 604, affirmed. CAIRN LINE OF STEAMSHIPS, LD. *v.* TRINITY HOUSE CORPORATION - **C. A. 528**

—— Insurance, Marine.
See under INSURANCE, MARINE.

—— Practice—Claim for instalment of contract price of ship - - - - **968**
See PRACTICE. 1.

—— Practice—Discovery—Ship's papers—Fire insurance - - - - - **1032**
See PRACTICE. 5.

SHIPPING—*continued.*

—— Workmen's compensation—"Workman"—Ship's captain—Remuneration - **803**
See EMPLOYER AND WORKMAN. 4.

SOLICITOR—*Bill of Costs—Misdescription—Bill improperly headed—Sufficiency of Bill—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Costs of Proceedings before Justices.*

The plaintiffs had acted as solicitors for the defendant's wife in a petition for judicial separation in the High Court, and subsequently in proceedings before justices under the Summary Jurisdiction (Married Women) Act, 1895. The petition in the High Court was dismissed, but the defendant was ordered to pay the costs as between party and party, which he did. The proceedings before justices were successful, and the defendant was ordered to pay a certain fixed sum for costs, which he paid accordingly. The plaintiff then delivered to the defendant the bill of costs on which the present action was brought, which was headed "In the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce)," and which contained not only the items of extra costs as between solicitor and client in the proceedings in that Court, but also items of costs in advising the wife as to her differences with the defendant and items of cost in respect of the proceedings before justices. The items allowed on taxation in the party and party bill of costs in the High Court were not included in the bill:—

Held, that the bill was not invalid, since in respect of the High Court costs it might be regarded as having been delivered in two parts, and in respect of the other items it gave the defendant all the information he could reasonably require, although those items were not separately headed.

Held, also, on the authority of *Cale* v. *James*, [1897] 1 Q. B. 418, that the costs in respect of the proceedings before justices could not be recovered. COBBETT *v.* WOOD **Pickford J. 590**

2. —— *Costs—Taxation—Practice—Agreement by Third Party to pay Costs—Question as to Construction of Agreement—Jurisdiction of Master—Payment of Bill—"Special Circumstances."*

Where there is an agreement by a third party to pay costs due to a solicitor from his client, it is not a bar to an application by the third party for taxation of the solicitor's bill under the Solicitors Act, 1843, s. 38, that questions will arise on the construction of the agreement, inasmuch as the taxing Master has jurisdiction to determine such questions for the purposes of the taxation.

Observations of Lord Langdale M.R. in *In re Rhodes*, (1844) 8 Beav. 224, and *In re Thompson*, (1845) 8 Beav. 237, not followed.

The "special circumstances" which justify the reference of a solicitor's bill of costs for taxation after payment are not confined to pressure, overcharge, or fraud, but include any circumstances of an exceptional nature which a judge in the exercise of a judicial discretion may consider to justify such taxation.

In re Norman, (1886) 16 Q. B. D. 673, followed.

In re HIRST & CAPES - - **C. A. 982**

SOLICITOR—*continued.*

3. —— *Lien on Client's Papers for Costs—Acceptance of Securities—Duty of Solicitor to inform Client of Intention to retain Lien.*

Where securities are given by a client to a solicitor to secure the payment of particular costs, the solicitor's general lien is unaffected.

Where a solicitor takes any security for his general costs which is inconsistent with the retention of his general lien, since it gives him some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give, that lien is gone unless he gives the client express notice of his intention to retain the lien.

Per Kennedy L.J.: *Semble*, if a solicitor when taking from his client any security for general costs intends to retain his lien, he ought, either by express words or by necessary implication, to make that intention known to his client. *In re* MORRIS - - - - - - **C. A. 473**

STAMPS—Mortgage—Stamp duty - - **865**
See REVENUE. 5.

—— Promissory note—Payable at sight—Ad valorem duty - - - - **582**
See REVENUE. 4.

STATUTE—*Construction of Statute—Statutory Power to make Contract for Supply of Electricity—Penalty for Default in supplying Electricity when required—Breach of Contract, Remedy for—Whether Action lies—Loughborough Corporation Act*, 1899 (62 & 63 *Vict. c. cxcvii.*), *ss.* 62, 65.

Where by statute contractual rights are conferred, clear words are required in the statute in order to place a limitation upon those contractual rights.

By s. 65 of the Loughborough Corporation Act, 1899, the corporation was empowered to make agreements with regard to a supply of electrical energy to consumers, and by s. 62 the corporation was made liable to a penalty for default in supplying energy to any owner or occupier of premises to whom they might be and were required to supply energy under the Act. The plaintiffs, who were not entitled to require a supply under the Act, made an agreement with the corporation for a supply of electrical energy:—

Held, that an action would lie at the suit of the plaintiffs against the corporation to recover damages for an alleged breach of the agreement to supply electrical energy, there being no clear words in the statute confining the remedy of the plaintiffs to proceedings to recover the penalty under s. 62 of the statute. MORRIS & BASTERT, LD. *v.* LOUGHBOROUGH CORPORATION - **C. A. 205**

STATUTES:—

1817.

57 Geo. 3, c. 93—*Distress—Costs* - - **672**
See PRACTICE. 2.

1831.

1 & 2 Will. 4, c. lii., s. 83—*West India Dock*
See SHIPPING. 6. **786**

STATUTES—*continued.*

1832.

2 & 3 Will. 4, c. 71, s. 3—*Prescription* - 39
See LIGHT.

1833.

3 & 4 Will. 4, c. 15, s. 1—*Dramatic Copyright*
See COPYRIGHT. 821

3 & 4 Will. 4, c. 30—*Poor Rate Exemption* 835
See RATES. 1.

3 Will. 4, c. xxxvi., ss. 55, 58—*London and Birmingham Railway Company* - 925
See MINES. 1.

1835.

5 & 6 Will. 4, c. 50, ss. 53, 54—*Highways* 365
See HIGHWAY. 4.

—— —— s. 85 - - - - - - 374
See HIGHWAY. 1.

1836.

6 & 7 Will. 4, c. 96, s. 1—*Parochial Assessments*
See RATES. 2. 642

1838.

1 & 2 Vict. c. 110, s. 12—*Judgments* - 1
See SHERIFF.

1842.

5 & 6 Vict. c. 45—*Copyright* - - - 821
See COPYRIGHT.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - - 590
See SOLICITOR. 1.

1844.

7 & 8 Vict. c. 101, s. 35—*Poor Law* - 407
See LOCAL GOVERNMENT. 1.

1845.

8 & 9 Vict. c. 18, s. 18—*Lands Clauses* - 611
See LANDS CLAUSES ACTS.

8 & 9 Vict. c. 20, ss. 50, 51—*Railways Clauses*
See RAILWAY. 1. 239

—— —— s. 78 - - - - - - 925
See MINES. 1.

8 & 9 Vict. c. 106, s. 5—*Real Property* - 629
See MINES. 2.

1847.

10 & 11 Vict. c. 17, s. 43—*Waterworks Clauses*
See WATERWORKS. 2. 917

10 & 11 Vict. c. 27, s. 33—*Harbours, Docks and Piers* - - - - - - - 659
See NEGLIGENCE.

10 & 11 Vict. c. 38, ss. 14, 15—*Land Drainage*
See LAND DRAINAGE. 485

1854.

17 & 18 Vict. c. 31, s. 7—*Railway and Canal Traffic* - - - - - - 252
See RAILWAY. 2.

1863.

26 & 27 Vict. c. 65, ss. 16, 25; Regulations 407, 587—*Volunteers* - - - 184
See ARMY AND NAVY.

1869.

32 & 33 Vict. c. 14, s. 19—*Customs and Inland Revenue* - - - - - 705
See REVENUE. 3.

STATUTES—*continued.*

32 & 33 Vict. c. 56, s. 22—*Endowed Schools*
See SCHOOLS. 1. 63

32 & 33 Vict. c. 67, Sched. III.—*Valuation—Metropolis* - - - - - 811
See LONDON. 2.

1872.

35 & 36 Vict. c. 94, s. 13—*Licensing* - 905
See LICENSING ACTS. 3.

—— —— s. 29 - - - - - - 654
See LICENSING ACTS. 1.

1873.

36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Judicature*
See RECEIVER. 79

—— —— s. 47 - - - - - - 67
See PRACTICE. 2.

1875.

38 & 39 Vict. c. 55, s. 41—*Public Health* 680
See SEWERS.

—— —— s. 211, sub-s. 1 (*b*) - - - 948
See RATES. 4.

—— —— s. 247 - - - - - - 407
See LOCAL GOVERNMENT. 1.

—— —— s. 308 - - - - - - 327
See COMPENSATION.

1878.

41 & 42 Vict. c. 31—*Bills of Sale* - - 667
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—— —— s. 4 - - - - - - 195
See BILL OF SALE. 1.

—— —— s. 10, sub-s. 3 - - - - 744
See BILL OF SALE. 2.

41 & 42 Vict. c. 49, s. 25—*Weights and Measures* - - - - - - 536
See WEIGHTS AND MEASURES.

41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives* - - - - - - 958
See HIGHWAY. 2.

1881.

44 & 45 Vict. c. 41, s. 58, sub-s. 1—*Conveyancing and Law of Property* - 629
See MINES. 2.

1882.

45 & 46 Vict. c. 43, s. 17—*Bills of Sale* - 667
See COMPANY.

45 & 46 Vict. c. 61, s. 7, sub-s. 3—*Bills of Exchange* - - - - - - 13
See BANKER. 2.

—— —— s. 20 - - - - - - 263
See BILL OF EXCHANGE.

—— —— s. 75, sub-s. 1 - - - - 293
See BANKER. 1.

45 & 46 Vict. c. ccli.—*Alexandra (Newport and South Wales) Docks and Railway Act* - - - - - - - 659
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—— —— s. 4, sub-s. (*g*)—*Bankruptcy* - 344
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1883.

46 & 47 Vict. c. 52, s. 12; s. 102, sub-s. 5—*Bankruptcy* - - - - - - 204
See BANKRUPTCY. 5.

STATUTES—*continued.*

1883.

46 & 47 Vict. c. 52, s. 38—*Bankruptcy* - 195
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—— —— ss. 38, 47 - - - - - 174
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1888.

51 & 52 Vict. c. 43, s. 66—*County Courts* 1002
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—— —— ss. 88, 93, 113 - - - 24
See COUNTY COURT. 3.

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52 & 53 Vict. c. 45, ss. 1, 2—*Factors* - 221
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52 & 53 Vict. c. 49, ss. 1, 12, 27—*Arbitration*
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—— —— ss. 4, 27 - - - - - - 403
See COUNTY COURT. 2.

1890.

53 & 54 Vict. c. 63, s. 8, sub-s. 2—*Companies (Winding-up)* - - - - 584
See DEFAMATION.

1891.

54 & 55 Vict. c. 39, s. 12, sub-s. 6 (*b*); s. 88; First Sched. "Mortgage," &c. (2)—*Stamps* - - - - - - 865
See REVENUE. 5.

1892.

55 & 56 Vict. c. 13, s. 3—*Conveyancing and Law of Property* - - - 596
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1893-4.

56 & 57 Vict. c. 73, s. 46, sub-ss. 1, 8—*Local Government* - - - - - 858
See LOCAL GOVERNMENT. 2.

1894.

57 & 58 Vict. c. 16, s. 1, sub-s. 4—*Supreme Court of Judicature (Procedure)* - 47
See PRACTICE. 3.

57 & 58 Vict. c. 30, ss. 1, 2, sub-s. 2—*Finance*
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57 & 58 Vict. c. 54, s. 1—*Railway and Canal Traffic* - - - - - - 771
See RAILWAY. 3.

57 & 58 Vict. c. 60, s. 85—*Merchant Shipping*
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57 & 58 Vict. c. clxxxvii., s. 289—*Thames Conservancy* - - - - - - 893
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1896.

59 & 60 Vict. 36, s. 1, sub-s. 1; s. 6, sub-ss. 1, 2, Sched.—*Locomotives on Highways* 958
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1898.

61 & 62 Vict. c. 29, s. 12, sub-s. 1; s. 17, sub-s. 2—*Locomotives* - - - - - 958
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1899.

62 & 63 Vict. c. 14, s. 14—*London Government*
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62 & 63 Vict. c. cxcvii., ss. 62, 65—*Loughborough Corporation* - - - 205
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1902.

2 Edw. 7, c. 28, s. 4—*Licensing* - - 905
See LICENSING ACTS. 3.

2 Edw. 7, c. 42, s. 7, sub-ss. 1 (*a*), 3; s. 10—*Education* - - - - - - 685
See SCHOOLS. 2.

1903.

3 Edw. 7, c. 36, s. 12, sub-s. 1; s. 20, sub-s. 3—*Motor Car* - - - - - - 958
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3 Edw. 7, c. 46, s. 7—*Revenue* - - 865
See REVENUE. 5.

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4 Edw. 7, c. 23, s. 1, sub-s. 2—*Licensing* 260
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—— —— s. 4 - - - - - - 654
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1905.

5 Edw. 7, c. 15, s. 3—*Trade Marks* - 712
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5 Edw. 7, c. 18—*Unemployed Workmen* - 858
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1906.

6 Edw. 7, c. 58, s. 1—*Workmen's Compensation* - - - - - - - 469
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—— —— Sched. I., ss. 1, 2 - - - 441
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—— —— Sched. I., s. 1 (*a*) (i.); s. 2 - 766
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STATUTORY POWERS — Damage caused by exercise of — Compensation — Public health—Sewers - - - - - 327
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STAYING PROCEEDINGS—Where submission to arbitration—County court—Jurisdiction - - - - - - 403
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TRADE MARK—*Proprietor—Salesman on Commission—Natural Product—Selection—Certification—Dealing with—Offering for Sale—Infringement—Trade Marks Act*, 1905 (5 *Edw* 7, *c.* 15), *s.* 3.

A salesman on commission may be the proprietor of a trade mark in respect of the goods which he sells on commission.

A trade mark may be registered in connection with vegetables and other natural products of the earth.

The plaintiffs were salesmen of vegetables on commission in Covent Garden Market. They dealt largely in the vegetables of a grower named Webb, on whose care and skill in selecting, grading, and packing they knew they could rely. They registered a trade mark under clauses 42 and 50 in Sched. III. to the Trade Marks Rules, 1890, and painted the same upon the baskets in which they sold the vegetables. Their practice was to send baskets with their trade mark upon them to Webb, who filled the baskets and forwarded them by rail to the plaintiffs. The plaintiffs' trade mark was well known, and goods sold by them under that mark had a high reputation in the market.

Owing to a dispute between them and the railway company the plaintiffs refused to take delivery of nine baskets forwarded by Webb as aforesaid. The railway company then procured the defendants under an indemnity to sell in the market the contents of the nine baskets. The defendants sold the contents in or from the baskets themselves :—

Held, that the vegetables so sold by the defendants were the goods of the plaintiff by virtue of selection, certification, dealing with, or offering for sale within the meaning of s. 3 of the Trade Marks Act, 1905 ; that there was nothing to prevent the plaintiffs from registering a trade mark in connection with those goods, and that the defendants had committed an infringement of that trade mark. MAJOR BROTHERS *v.* FRANKLIN & SON - - - Jelf J. 712

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—— Insurance, Marine—Warranty of freedom from capture—Capture of neutral ship by belligerents — Subsequent loss by perils of the sea - - - - **601**
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WATER—Rates—"Land covered with water"—Pontoons floating over excavated ground
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WATERWORKS—*Land Compulsorily taken—Compensation — Special Value — Obtainable by Compulsory Powers—Reservoir.*

Where land is compulsorily taken for the purpose of making a reservoir, and the land has a natural and peculiar adaptability for the construction of a reservoir, the tribunal assessing the compensation is not precluded from taking into consideration the natural adaptability of the land by reason of the fact that the land could not be utilized for the construction of a reservoir unless parliamentary powers for the compulsory purchase of other land were first obtained. *In re* LUCAS AND CHESTERFIELD GAS AND WATER BOARD - - **Bray J. 571**

2. —— *Neglect to Furnish a Supply of Water for Domestic Purposes—Insufficiency of Supply — Penalty — Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 43.

By s. 43 of the Waterworks Clauses Act, 1847, if a water company "neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water [*sic*] during any part of the time for

WATERWORKS—*continued.*

which the rates for such supply have been paid or tendered," they are to be liable to a penalty:—

Held, that the above provision applies only to a total cessation of the supply, and not to a neglect to furnish a sufficient quantity. If the water company continuously supply the consumer with some water for his domestic purposes, the fact that the quantity supplied is insufficient for the reasonable requirements of his house does not constitute an offence within the section. SIMPSON *v.* SOUTH OXFORDSHIRE WATER AND GAS COMPANY - - **Div. Ct. 917**

—— Waterworks — Insufficiency of supply — Penalty - - - - - **917**
See WATERWORKS. 2.

WEIGHTS AND MEASURES—*False or unjust Measure—Possession for use for Trade—Master and Servant—Possession by Servant for own fraudulent Purpose—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The appellants owned oil depots, from which a number of tank-waggons were sent out in charge of drivers, each driver being supplied with two five-gallon measures for the purpose of measuring oil sold and delivered to the appellants' customers from the tank-waggon.

At all the depots an engineer was employed to examine all measures used by the tank-waggon drivers, and if a measure was found in any way faulty or unjust, its use was at once discontinued, it was put into a separate part of the appellants' premises, and a new measure without any defects issued in its place. In the ordinary course of business measures withdrawn from use were attended to and their faults or defects rectified.

On March 15, 1907, two measures were supplied to one of the appellants' drivers for use during that day. Each measure was examined by the appellants' engineer and found to be absolutely correct. Measures set aside for repair were accessible to the driver.

The respondent, an inspector of weights and measures, found the driver in Bermondsey on that day in charge of a tank-waggon belonging to the appellants containing oil, and having in his possession two five-gallon measures, one of which was correct, but the other was found to have in the angle formed by the side and bottom thereof, and at the bottom of the measure itself, a quantity of soap, the effect of which was to render it false and unjust to the extent of three and half pints. The unjust measure belonged to the appellants. One of the correct measures supplied by the appellants to the driver on the morning of March 15, 1907, could not be traced.

The quantity of oil contained in the tank-waggon was measured and booked out against the driver every morning, and similarly checked on his return in the evening of the same day; and the driver did not, either on March 15, 1907, or any previous day, bring back in his tank-waggon more oil than his deliveries during the day accounted for. It was not proved that the appellants were cognizant of the driver's conduct, or that they gave their sanction or approval to the use by him of the unjust measure.

On an information preferred by the respondent

WEIGHTS AND MEASURES—*continued.*

against the appellants for that they on March 15, 1907, did, whilst hawking oil from a van in Bermondsey, unlawfully have in their possession for use for trade a false or unjust measure contrary to s. 25 of the Weights and Measures Act, 1878 :—

Held, that the Court was at liberty so far to apply the principle which is well settled in reference to civil liability for torts (that an employer is not liable for fraudulent acts of his servant when committed not in the interest of the employer, but for the individual purposes of profit of the fraudulent servant) as to say that, as the fraudulent driver had the fraudulent measure in his own physical possession for his own fraudulent purposes as distinguished from the interests of his employers, his possession must be deemed to be his own possession, and not the possession of his employers, and that, therefore, the offence with which the appellants were charged had not been made out. ANGLO-AMERICAN OIL CO., LD. *v.* MANNING
Div. Ct. 536

WEST INDIA DOCK ACT—Ship—Dock company—Exemption from dock rates—Lighter - - - - - - **786**
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